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Administrative Law: A Symposium

Foreword

In the past, it has been the policy of the *Albany Law Review* to present and consider problems which are of particular interest to the practising bar. The administrative process presents to the attorney many novel problems. The recognition of its growing influence among the members of the bar has been evidenced, in part, by the proportionate increase of administrative law courses in the law school curriculum. It was, therefore, the feeling of the Editorial Board that a series of articles dealing with the problems involved in administrative practise would be helpful.

In planning the symposium, the Board felt that some aspects of the administrative process might be brought into sharper focus by the use of an illustrative approach, with treatment in greater detail, while others might be more beneficially considered in the broader, more traditional manner. Accordingly, the illustrative approach was adopted in the articles dealing with the informal and formal adjudicative processes, and the introductory article and the articles treating evidentiary matters and judicial review are developed along the broader lines. The perspective of New York administrative law has been retained throughout.

It was also felt that a more realistic picture of the administrative agency as it confronts the attorney might be drawn by persons representative of several areas of the field, and the outline of the symposium was developed along these lines. It is hoped that the symposium is useful in its presentation.

The cooperation of the contributors to this symposium is gratefully acknowledged by the Editorial Board.

John Carter Rice
Editor-In-Chief
Albany Law Review

Introduction to Symposium on Administrative Law for the New York Lawyer

Robert M. Benjamin *

I am grateful for the opportunity of introducing this symposium on a subject the importance of which the practising lawyer has increasingly recognized. The articles which follow will make a welcome contribution to his understanding of the framework of that field of "law in action," and of many of the problems which he will encounter in his practise.

Mr. Naftalison has paid me the compliment, in the introductory portion of his article on the adjudicative process under the New York Unemployment Insurance Law, of quoting from a Moreland Act report that I submitted in 1942[1] a statement of the basic problem of administrative procedure (page 41, *infra*). It is, I think, of greater interest to quote a like statement from the 1957 Report of the Committee on Administrative Tribunals and Enquiries[2] appointed by the Lord High Chancellor of Great Britain, known (from the name of its chairman, Sir Oliver Franks, former Ambassador to the United States) as the Franks Committee. The Franks Committee wrote:[3]

> 21. . . . Administration must not only be efficient in the sense that the objectives of policy are securely attained without delay. It must also satisfy the general body of citizens that it is proceeding with reasonable regard to

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* A.B., LL.B. Member of the New York Bar. Moreland Act Commissioner 1939–1942. Member Regents' Committee on Discipline (under Section 211, N.Y. EDUCATION LAW) 1947–1955; Chairman 1949–1955. Member oral-examination panels on State Civil Service Commission competitive examinations for hearing-officer positions.

[1] ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK (1942).

[2] 1957 Cmnd. No. 218.

[3] *Id.* at 5.

> the balance between the public interest which it promotes and the private interest which it disturbs . . .
>
> 22. . . . In this country government rests fundamentally upon the consent of the governed. The general acceptability of these adjudications is one of the vital elements in sustaining that consent.

The Franks Committee's study and report illustrate the wide geographical spread of interest in problems of admintrative law like ours. I found another illustration a year ago in an assignment as consultant to the Indian Law Institute in New Delhi on a project of theirs for research in the fields of administrative procedure, legislative and adjudicatory, and judicial review.[4]

While the problems of administrative law are the subject of intensive consideration throughout this country and abroad, I am glad that the present symposium is directed to our own State of New York. Over many years our system of administrative law has been developed through diligent and informed action of the Legislature, the Executive and the courts, with results in which we may take pride without shutting our eyes to the need of doing more. Though it is understandable that the teaching and study of administrative law should often be directed primarily to the Federal field, I think that much is lost by overlooking the smaller-scale operation of administrative law in the states and especially (if that view is not too parochial) in New York. Developments here can have great value outside our borders.[5] To the lawyer practising in New York the importance of knowing our administrative law system is self-evident.

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[4] Deriving, as they do, largely from the English prerogative writs, including certiorari, mandamus and prohibition, the Indian forms of judicial review resemble in many respects those with which we are familiar in New York. There are, however, interesting variants. Thus, the availability of review by certiorari depends, not on whether the administrative determination has been arrived at as the result of a prescribed hearing, but whether the administrative action is of a "judicial nature."

[5] For one example, the test of "substantial evidence on the record considered as a whole" for the review of quasi-judicial determinations of fact

A few practical points for the practising lawyer may be an appropriate part of this introduction. The most important of these is that the lawyer should prepare his case before an administrative agency as carefully as he would if he were going before a court.

Particularly in view of the comparative informality of many administrative proceedings, and the short time between, say, a notice of hearing and the hearing itself, lawyers sometimes lean too heavily on an assumption that they are entitled to be helped to find their way through the proceeding, and educated during the course of it, by the administrator. Certainly administrators should be helpful in this way, as I always emphasize when I talk to administrators. But the most effective operation of administrative proceedings requires cooperation on both sides. The first requirement on the part of the lawyer is that he should know his case and the law and regulations that govern it.[6] Some agencies (*e.g.*, the Unemployment Insurance Appeal Board, discussed in Mr. Naftalison's article, and the State Labor Relations Board) publish the results of their prior adjudication; obviously the lawyer with a case before such an agency should be as familiar with this material as he would be with judicial precedent if he had a case in court. He should know, as he would in court, how the hearing

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was first formulated, so far as I am aware, in Stork Restaurant, Inc., v. Boland, 282 N.Y. 256, 26 N.E.2d 247 (1940); see Benjamin, *Judicial Review of Administrative Adjudication,* 48 COL. L. REV. 1, 1–2 (1948); *cf.* Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 481–2 (1951), attributing the origin of the phrase "upon the whole record" to the minority of the Attorney General's Committee on Administrative Procedure, though that committee in fact reported after the *Stork Restaurant* case had been decided.

[6] I shall have more to say below about the severe deficiencies in the present comprehensive Official Compilation of the Codes, Rules and Regulations of the State of New York; but the regulations (including procedural regulations) of individual agencies are presently in many instances available for distribution on request to the agency, and in some instances (*e.g.*, the Public Service Commission, the State Liquor Authority) are published in McKinney's.

officer will deal with the questions of evidence discussed in Mr. Anderson's article.

The lawyer should have in mind also the effect of the form of procedure in his proceeding on various things that will follow from it, especially as to the method of judicial review (a subject developed more fully in Mrs. Toch's article). Unless the particular statute itself contains specific provisions for judicial review (*e.g.*, workmen's compensation, unemployment insurance),[7] a determination made after a hearing prescribed by statute (expressly or by implication) or required by due process will be reviewable under Article 78 of the Civil Practice Act by a proceeding in the nature of certiorari; and such review will (except as to such collateral issues as alleged prejudice or the accuracy or completeness of the record) be confined on questions of fact to the evidence in the record.[8] Where there has been no prescribed hearing, even though a hearing has been voluntarily accorded by the administrator, judicial review under Article 78 will be in the nature of mandamus, where issues of fact are ordinarily triable on new evidence before a court, a referee, or a jury.[9] It is not always easy to tell whether a hearing is required by statutory implication or by due process;[10] but it is obviously important that a lawyer should ascertain, as far as he can, whether the record he is making in an administrative proceeding will be the sole basis for judicial review on the facts. The distinction between required hearing procedures and others has other consequences, of which I mention one, the requirement in prescribed hearing proceedings that the administrator make findings of fact.[11]

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[7] See Dr. Brind's article as to the statutory limitation of judicial review of determinations of the Commissioner of Education under Section 310 of the Education Law. Under Section 76 of the Civil Service Law there is a like limitation where an employee appeals to the appropriate civil service commission from a determination in a disciplinary proceeding (instead of adopting the statutory alternative of direct judicial review under Article 78 of the Civil Practice Act).

[8] Newbrand v. City of Yonkers, 285 N.Y. 164, 177–178, 33 N.E.2d 75, 81–82 (1941).

[9] See *op. cit. supra* note 1, Vol. I at 91.

[10] Newbrand v. City of Yonkers, *supra* note 8; Hecht v. Monaghan, 307 N.Y. 461, 121 N.E.2d 421 (1954).

A Division of Administrative Procedure

I have suggested above that, despite our proper pride in the past development of administrative law in this State, we must recognize that much still remains to be done. In my 1942 Moreland Act report I recommended, as the basis for the solution of continuing problems, setting up in the Executive Department a new division, which might be called the Division of Administrative Procedure, headed by a Director of Administrative Procedure appointed by the Governor and holding office during his pleasure.[12] A modest organization was recommended at least at the outset, two assistants to the Director and a small stenographic and clerical force.[13] The functions of the proposed Division were stated as follows:[14]

> The Division would have, within the field of its activity, powers of investigation similar to those conferred by Section 8 of the Executive Law [the Moreland Act]. It would have no other powers of compulsion. Its functions would be the following:
>
> 1. To continue permanently an objective and detailed examination and study of quasi-judicial and quasi-legislative procedures and of problems of judicial review.
> 2. To act as a source of technical information and expert assistance to the departments, boards and commissions of the State government with respect to their procedures.
> 3. To assist, on the request of an agency, in the preparation or revision of its procedural rules.
> 4. To receive from the public complaints and suggestions with respect to procedures that are considered objectionable or subject to improvement.

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[11] Elite Dairy Products, Inc. v. Ten Eyck, 271 N.Y. 488, 3 N.E.2d 606 (1936); see also Barry v. O'Connell, 303 N.Y. 46, 100 N.E.2d 127 (1951).

[12] *Op. cit. supra* note 1, Vol. I at 18–21.

[13] *Id.* at 21.

[14] *Id.* at 18.

5. To assist in an advisory capacity in reconciling differences that arise out of conflicting or overlapping jurisdication or procedures of different agencies.
6. To administer the legislation that must be enacted (pursuant to Article IV, Section 8, of the Constitution) to provide for the publication of rules and regulations.
7. To report to the Governor, annually or at more frequent intervals, on the results of its study and examination and on its other activity; such reports to include recommendations for any legislation that is thought to be desirable.

Most of what I still have to say in this introduction can be related to these proposed functions of such a Division; and, since I believe the general proposal to be vital to the proper future development of our system of administrative law, I shall continue my discussion under headings taken from the above statement of functions.

1. *To continue permanently an objective and detailed examination and study of quasi-judicial and quasi-legislative procedures and of problems of judicial review.*

My Moreland Act report[15] included, besides the initial volume dealing with general problems, five additional volumes containing supplementary reports on the procedures of particular agencies (though in the time available it was impossible to complete reports on a number of them).[16] These reports have proved to be of value not only to the agencies themselves but also to the public. In the intervening years some of the problems dealt with have been disposed of, other new problems have arisen, and the descriptive material in some of the reports has become out of date. It is, I think, of great importance that there should be a permanent, continuing program of bringing such reports up to date from time to time, and of preparing like descriptive and critical reports on the procedures of agencies which the original reports did not cover.

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[15] *Op. cit. supra* note 1.

[16] There was an added reason, besides lack of time, for our inability to complete a supplementary report on the procedures in unemployment insurance: in the course of our observation and conferences with the Unemployment Insurance Appeal Board, referees and staff, so many changes were made for the better in the procedures for adjudication that it became impossible to fix a point at which one could describe accurately what the current procedures were.

It is important that reports of this kind should cover the whole range of the State's administrative agencies, especially since there are few individual agencies in which all the relevant problems are exemplified. The interesting and useful articles in this symposium by Dr. Brind and Mr. Naftalison regarding the procedures of the two agencies with which they are respectively identified do not, for example, touch the problem, vital elsewhere,[17] of the best procedure for decision where decision is to be made by a commission or board and the volume of adjudication is so great that all members cannot possibly have participated in the hearing process or even have read the entire hearing records.[18] For another example, in the field of unemployment insurance, dealt with in Mr. Naftalison's article, there is an effective separation of the functions involved in adjudication, so that the problem of the proper separation of functions does not arise.[19]

The reports which the Division of Administrative Procedure would continue to revise and prepare would be only one aspect of a continued examination and study of administrative procedures. That process, involving observation of procedures in operation and conferences with the administrators at all levels, would be of even greater value. The satisfactory solution of the many and complex problems of quasi-judicial and quasi-legislative procedure requires not only an informed appraisal of the procedures presently in use in a given agency but also an awareness of available procedural possibilities, of which a particular administrator may be unaware. I was struck at the beginning of my 1939–1942 Moreland Act study by the degree to which some of the most competent administrators were unaware not only of some of the major general problems but also of many important aspects of the rule-making and adjudicating procedures actually being followed in their own agencies. This, when one considers it, is not surprising, since many top administrators have many and varied responsibilities, and their quasi-judicial and quasi-legislative procedures may, not unnaturally, seem to them relatively unimportant until the importance is made clear to them. The kind of objective and detailed study that my Moreland Act inquiry provided (and which I think should be put on a permanent and continuing basis through the proposed Division of Administrative Procedure) was welcomed by the administrators with whom I was dealing, and was put generally to effective use.

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[17] *E.g.*, in the Public Service Commission and the State Liquor Authority.

[18] As to this and other problems regarding the procedure for decision, see *op. cit. supra* note 1, Vol. I at 221–251, and, *e.g.*, Vol. II, Supplementary Report on the Department of Public Service, at 187–189.

[19] As to this problem see the discussion in *op. cit. supra* note 1, Vol. I at 44–71, Vol. IV, Supplementary Report on the Department of Taxation and Finance, at 269–277, and Vol. V, Supplementary Report on the State Labor Relations Board, at 165–176.

The Division would deal also with questions of judicial review, which still arise frequently in the form of judicial decision or proposed legislation. Here again, familiarity with the existing system would provide quick and informed judgment on new questions as they arise. It should be added that litigation and legislation may often affect the procedures of agencies other than those directly concerned, and that the interests of the State may require a more general approach to a particular problem than would be apparent to those not dealing constantly with such problems.

2. *To act as a source of technical information and expert assistance to the departments, boards and commissions of the State government with respect to their procedures.*

In my Moreland Act report I expressed the view that "[m]uch more can be accomplished . . . by voluntary administrative improvement of procedures than by improvement imposed by legislation. . . ."[20] My experience at that time, which I have just recounted, is ground for confidence that the assistance of the Division would be often sought and acted upon by the administrative agencies of the State.[21]

The Division would act as a staff arm of the Governor. I would emphasize here that, while it would have powers of investigation necessary to insure thorough and comprehensive examination of agency procedures, it would itself have no powers of compulsion over any agency, thus leaving ultimate responsibility with the administrator, where in my view responsibility should be lodged.

3. *To assist, on the request of an agency, in the preparation or revision of its procedural rules.*

Assistance in the preparation or revision of procedural rules is one aspect of the general function of assistance just discussed. It is one in which the special competence of the Division would be particularly useful. The drafting of adequate procedural rules is especially difficult, and familiarity with the procedural rules of other agencies with like problems would be most helpful.

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[20] *Op. cit. supra* note 1, Vol. I at 11.

[21] I found, for example, cooperation from the Education Department, headed by the Board of Regents elected by the Legislature, no less than from agencies whose heads are appointed by and responsible to the Governor.

While, as I have said, there would be no power of compulsion, it might well be provided that all procedural rules must be filed with the Division, for its comment and criticism, before being made effective.

4. *To receive from the public complaints and suggestions with respect to procedures that are considered objectionable or subject to improvement.*

It is of the first importance that suggestions as to procedure coming from those outside the Government (including those with whom the agencies deal directly, and bar associations or other like public bodies) should be received and dealt with in such a way that those who have made them will be given adequate opportunity to meet objections to their suggestions that have been raised within the Government, and will be satisfied ultimately that their suggestions have been fully and sympathetically considered.

There is often an understandable reluctance on the part of those who deal with an agency, regularly or intermittently, to make complaint as to procedures when no provision has been made for inviting it. There are instances also, especially instances involving preliminary procedures, where, if one's only recourse is to the agency and the agency cannot be brought to agree, the objection to a procedure will be finally foreclosed because it will not survive on judicial review. As I have found in bar association experience, suggestions for procedural changes which would affect agencies generally sometimes elicit from one or more of the agencies forecasts of difficulties which appear to the proponents to be imaginary.

In these and other circumstances the Division could act as an informed, objective and impartial mediator, providing a forum for full discussion between agency and outside interest, with informed argument on both sides which might reach a joint conclusion that the complaint or proposal was sound or unsound, or might result in modifications to meet valid objections.

My own experience in my Moreland Act study leads me to value highly discussion of this kind as a means of informing administration and of tempering outside views adverse to administration.

5. *To assist in an advisory capacity in reconciling differences that arise out of conflicting or overlapping jurisdiction or procedures of different agencies.*

Difficulties of conflicting or overlapping jurisdiction are likely to be infrequent. Where they do arise they can be disruptive; and the Division would supply machinery for working them out.

6. *To administer the legislation that must be enacted (pursuant to Article IV, Section 8, of the Constitution) to provide for the publication of rules and regulations.*

Provision for a comprehensive publication of rules and regulations pursuant to the mandate of Article IV, Section 8, of the Constitution[22] was first made by Chapter

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[22] Article IV, Section 8, was added to the Constitution by vote of the electorate following the Constitutional Convention of 1938. It reads as follows:

> "No rule or regulation made by any state department, board, bureau, officer, authority or commission, except such as relates to the organization or internal management of a state department, board, bureau, authority

618 of the Laws of 1944, which vested the publication function in the Department of State.[23]

The first publication of the Comprehensive Compilation of the Codes Rules and Regulations of the State of New York was made, in 1945, in loose-leaf form. For the next three years cumulative supplements were published in paper-bound volumes. Since then there have been non-cumulative paper-bound supplements. Each supplement includes all the rules and regulations adopted by all State agencies during a calendar year.[24] The lapse of time between the adoption of a regulation and its publication would in any event render the compilation practically ineffective as a source of current information for the bar and the public. Apart from that, the task of tracing any new or amended regulation back through earlier non-cumulative supplements to find its proper context is, as a practical matter, close to insuperable.

Dissatisfaction with the existing scheme of publication led to an appropriation by the 1957 Legislature to the Attorney General for an official study of the problem. The Administrative Rules Publication Study continued through

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> or commission shall be effective until it is filed in the office of the department of state. The legislature shall provide for the speedy publication of such rules and regulations, by appropriate laws."

Questions regarding the appropriate content of the required legislation are discussed in *op. cit. supra* note 1, Vol. I at 314–325.

[23] A bill passed by the Legislature in 1939 was vetoed by the Governor primarily on the ground that it assigned the function of compilation and publication to the Director of the State Library rather than to the Department of State; the Acting Director of the State Library, the Education Department and the Department of State all opposed approval (see *op. cit. supra* note 1, Vol. I at 317–318).

[24] The Eleventh Supplement, covering rules and regulations issued from January 1 to December 31, 1955, was (typically) issued in the summer of 1956, so that rules and regulations effective in January, 1955, were not so published until a year and a half had elapsed. Perhaps because of the pending consideration of a change in the method of publication referred to in the text, no supplement was issued thereafter until the Twelfth Supplement, covering the period January 1 to December 31, 1956, appeared in the summer of 1959.

that year, under Nicholas Atlas and Lester Esterman, Special Assistant Attorneys General, with an Advisory Committee on which I had the privilege of representing the New York State Bar Association. This Study resulted in the introduction and passage by the 1958 Legislature of a bill[25] to vest the publication function in the Law Reporting Bureau and the State Reporter. The bill was vetoed, the veto message quoting the Division of the Budget as suggesting that the answer to the problem is "to effect necessary changes in policies and procedures in the Department of State." Consideration of the problem continued in the 1959 Legislature, but no bill was passed. I believe that a solution will be reached in 1960; but, having brashly and erroneously predicted in 1958 that the Atlas-Esterman solution would be adopted in 1959,[26] I refrain now from predicting what the 1960 solution will be.

The necessity of correcting the deficiencies in the present publication of rules and regulations being urgent, and no Division of Administrative Procedure having yet been created, I concurred in 1958 and 1959, as a member of the Advisory Committee of the Administrative Rules Publication Study and in behalf of the Committee on Administrative Law of the New York State Bar Association, in the Atlas-Esterman proposal. I am still, however, of the opinion that vesting the publication function in a Division of Administrative Procedure, as my Moreland Act report proposed,[27] would be clearly better. If a Division of Administrative Procedure is set up in 1960, I would expect that the publication function would be committed to it; if later, I would hope that the function would be transferred to it, or at least that an appropriate division of functions with respect to the publication might be worked out between the Division and whatever agency had been vested with the function in 1960.

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[25] 1958 A. Int. 3138, S. Reprint 4546.

[26] Report of Committee on Administrative Law, December 31, 1958, LXXXII N.Y. State Bar Assn. Rep. 72 (1959).

[27] *Op. cit. supra* note 1, Vol. I at 20–21, 318–319.

7. *To report to the Governor, annually or at more frequent intervals, on the results of its study and examination and on its other activity; such reports to include recommendations for any legislation that is thought to be desirable.*

The Division would, as I have noted above, be a staff arm of the Governor. It would keep him informed by its reports of the progress of its work and of such desirable procedural changes as the Division itself might not have been able to effect by persuasion. Such reports and recommendations might result in action by the Governor himself or in proposals for legislation that he might put forward.

The Division would also be of particular value to the Governor in his consideration of legislative proposals, emanating from other sources, affecting matters within the field of its special competence. Such legislative proposals, relating both to procedural matters and to judicial review, are frequent. The full implications of such proposals are often not readily apparent; and the familiarity of the Division with the factual and legal background would be of the greatest value in dealing with them.

I have mentioned before the general receptivity I found on the part of administrators to informed and objective suggestions for procedural improvement; but there is another side. I am convinced by experience that, in the absence of centralized responsibility for constant attention, needed change may be blocked by inertia. I mention, by way of example, suggestions in my Moreland Act report to which I can see no possible objection and which nevertheless have led to no action, *e.g.*, a recommendation[28] for enactment of a statute authorizing application to a court to punish for contemptuous conduct in an administrative proceeding or to enforce, by contempt proceedings, obedience to the proper rulings and directions of the hearing officer, and a recommendation[29] for review of existing immunity statutes. Besides such recommendations for legislation, there were recommendations for administrative action which have been ignored by one agency or another. The Division of Administrative Procedure, as a continuing staff arm of the Governor, could give to such matters the spur of attention that is sometimes necessary for action.

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[28] *Op. cit. supra* note 1, Vol. I at 133.

Shortly after the submission of my Moreland Act report, the recommendation for a Division of Administrative Procedure was approved for early adoption by the New York State Bar Association and the Association of the Bar of the City of New York. That support for the recommendation has continued, though it has not yet succeeded.

In 1948, after bar association discussion with Counsel to the Governor, there was set up a Conference of Administrative Counsel, under the chairmanship of the then Solicitor General, made up of the General Counsel (or their representatives) of the State agencies having most to do with administrative adjudication, which met periodically to consider procedural questions of mutual concern.[30] This was a step towards achieving some of the purposes of the proposed Division of Administrative Procedure, but in my judgment an inadequate step even as to the purposes it set out to achieve. The necessary continuing, objective and detailed examination of the procedures of all agencies, and the necessary detached advice, are I believe inherently impossible for a body so constituted, and operating without permanent staff. Nor are there, in my opinion, any other adequate available substitutes for the proposed Division. The Administrative Management Unit of the Division of the Budget, for the competence of which in its own field

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[29] *Op. cit. supra* note 1, Vol. I at 155–156.

[30] The Conference of Administrative Counsel was abandoned when, in 1955, the Administration became Democratic and the Attorney General remained Republican. It has, I am informed, resumed this year.

I have the highest regard, is not expertly informed in the problems of quasi-judicial and quasi-legislative procedure and judicial review with which we are concerned. There are in the office of Counsel to the Governor lawyers expert in these problems, but the difficulty there is that that office is kept busy with a great variety of other activities and cannot find time for the varied functions that I have outlined above, or indeed for constant attention to any of them.

I should, before concluding, mention views and developments elsewhere. A somewhat similar proposal was made, at about the same time as mine, by the Attorney General's Committee on Administrative Procedure (known as the ''Acheson Committee'').[31] The President's Conference on Administrative Procedure, made up largely of representatives of the Federal agencies, recommended in its final report[32] early in 1955 the setting up of an Office of Administrative Procedure in the Department of Justice (citing the recommendation of the Acheson Committee, my Moreland Act recommendation, and the Division of Administrative Procedure established in California in 1945[33]). Such an office has now been set up. The American Bar Association has recommended the setting up by legislation of such an Office as an agency independent of the Department of Justice, and with additional functions, and bills to effect this recommendation are pending in the 86th Congress.[34] The Franks Committee recommended, in a somewhat narrower field, the setting up of a Council on Tribunals,[35] and this recommendation was given effect in the Tribunals and Inquiries Act, 1958.[36]

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[31] Report, *Administrative Procedure in Government Agencies,* Senate Doc. No. 8, 77th Cong., 1st Sess., 123–124.

[32] PRESIDENT'S CONFERENCE, REPORT ON ADMINISTRATIVE PROCEDURE at 3–4, 46–48 (1955).

[33] See the Tenth Biennial Report of the Judicial Council of California (1944), and Chap. 867, Laws of 1945, Gov. Code Secs. 11500 *et seq.* The Report refers (pp. 10–11) to the Acheson Committee's recommendation and mine.

[34] S. 600, H.R. 7092. S. 600 is currently the subject of hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary.

This widespread interest in such machinery for the improvement of administrative procedure offers, I believe, strong support for my recommendation for New York.

It is, I believe, of vital interest to the State, in its relations with its citizens, to afford them the highest quality of administrative adjudication and legislation and judicial review. The accomplishment of that purpose requires informed competence and constant application through adequate machinery. The proposed Division of Administrative Procedure would supply such machinery where none now exists and where I see no other way of supplying it.

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[35] *Op. cit. supra* note 2 at 10, 30–31.

[36] 6 & 7 ELIZ. 2, CH. 66, Subsection (1) of Section 1 of the Act is as follows:

> "1.—(1) There shall be a council, entitled the Council on Tribunals,—
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> (a) to keep under review the constitution and working of the tribunals specified in the First Schedule to this Act (being the tribunals constituted under or for the purposes of the statutory provisions specified in that Schedule), and, from time to time, to report on their constitution and working;
>
> (b) to consider and report on such particular matters as may be referred to the Council under this Act with respect to tribunals other than the ordinary courts of law, whether or not specified in the First Schedule to this Act, or any such tribunal;
>
> (c) to consider and report on such matters as may be referred as aforesaid, or as the Council may determine to be of special importance, with respect to administrative procedures involving, or which may involve, the holding by or on behalf of a Minister of a statutory inquiry, or any such procedure."

The Council is to consist of not more than fifteen nor less than ten members appointed by the Lord Chancellor and the Secretary of State for Scotland.

Administrative Evidence in New York: An Examination of Judicial Opinions

Francis H. Anderson *

One reason, although probably a minor one, for the development of the administrative process was an intention on the part of legislatures to avoid alleged judicial technicalities,[1] including the rules of evidence,[2] in the solution of certain modern governmental problems. For many years the New York legislature has implicitly demonstrated such an intention when establishing new agencies or providing for their procedure. In creating the Public Service Commission in 1907, the legislature declared that the Commission ''shall not be bound by the technical rules of evidence.''[3] Similar emancipatory declarations have been enacted for civil service removal proceedings, disciplinary proceedings under the Education Law, anti-discrimination hearings, unemployment insurance hearings, workmen's compensation and disability benefit cases, and other administrative adjudication. As recently as 1951 this policy was reaffirmed in the statutory provisions for the disqualification of persons from state governmental service by reason of subversive conduct.[4]

After these many years and in view of this continuing legislative policy, it is now certainly fair to examine judicial reaction in New York. However, this examination does not purport to assess the overall result of the legislative policy because two phases of such an overall assessment will not be considered in this article. One factor is the "legal residuum" rule;[5] the other is the everyday practice of the agencies and their hearing officers.[6]

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[1] Schoenstein v. McGoldrick, 279 App. Div. 395, 110 N.Y.S.2d 374 (1952).

[2] United States v. United Shoe Machinery Corporation, 89 F.Supp. 349 (1950); 1 WIGMORE, EVIDENCE 36–37 (3rd ed. 1940).

[3] N.Y. Sess. Laws 1907, ch. 429, § 20.

[4] N.Y. UNCONSOL. LAWS § 1107 (McKinney 1949).

Administrative evidence has attracted the attention of some legal writers. No one, of course, should overlook Commissioner Robert M. Benjamin's authoritative work in this field when considering New York administrative evidence.[7] Davis,[8] Norwood,[9] Wigmore,[10] Stephens,[11] Stephan[12] and Vanderbilt[13] have all added to the aggregate information and comment. A study of all of these authorities, as well as the decisions hereinafter to be mentioned, clearly establish the general rule as set down by Benjamin "that in the conduct of quasi-judicial hearings administrative agencies are not legally bound by the exclusionary rules of evidence which limit admissibility in judicial proceedings. To put the matter another way, the mere admission of evidence that would be excluded by the legal rules of evidence, whether on grounds of incompetency, irrelevancy or immateriality, will not vitiate the proceeding.''[14] With this as a point of departure what have the courts done?

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[5] See Mrs. Toch's article, *Judicial Review of Administrative Determinations in New York State,* 24 ALBANY L. REV. 95 (1960).

[6] See Kenneth Culp Davis' excellent article, *An Approach to Problems of Evidence in the Administrative Process,* 55 HARV. L. REV. 364 (1942), wherein he comments at 367: "[T]he approach to problems of evidence in the administrative process must be through the work of the agencies themselves and not through the opinions of reviewing courts." Although Davis is pre-eminently correct insofar as the development of a system of administrative evidence and an understanding thereof is concerned, the bar, government lawyers and the administrative fact-finder should always remember to cast a "weather eye" toward the appropriate courthouse.

[7] See 1 BENJAMIN, ADMINISTRATIVE ADJUDICATION IN NEW YORK 170–194 (1942), and also the evidential references with respect to particular agencies in the supplementary volumes II–VI (1942) of his Moreland Commission reports.

[8] Davis, *op. cit. supra* note 6, and 2 DAVIS, ADMINISTRATIVE LAW TREATISE 250 (1958).

[9] Norwood, *Administrative Evidence in Practice,* 10 GEO. WASH. L. REV. 15 (1941).

[10] 1 WIGMORE, *op. cit. supra* note 2, §§4a, 4b, and 4c.

[11] STEPHENS, ADMINISTRATIVE TRIBUNALS AND THE RULES OF EVIDENCE (1937).

[12] Stephan, *The Extent to Which Fact-Finding Boards Should Be Bound by Rules of Evidence,* 24 A.B.A.J. 630 (1938).

[13] Vanderbilt, *The Technique of Proof Before Administrative Bodies,* 24 IOWA L. REV. 464 (1939).

Testimony Under Oath

The failure to swear witnesses in disciplinary proceedings is ground for reversal upon review. Such a proceeding is judicial in nature and the responsibility of an oath[15] should be imposed upon witnesses. Although this rule was established in a case, *People ex rel. Kasschau v. Board of Police Commissioners of the City of New York*,[16] in which a specific rule required sworn testimony except in trivial cases, subsequent decisions have not relied upon the necessity of a rule.[17] In a recent dictum, involving an administrative revocation of a hack driver's license, the court of appeals has described ''the judicial oath'' as one of the ''traditional safeguards to truthfulness.''[18] There is some authority that an oath is not required in administrative proceedings, such as proceedings for zoning variations.[19] A party cannot be heard to complain that his own witnesses were not sworn.[20] An inadvertent failure to swear a witness who was recalled after once being sworn is not ground for reversal.[21] Unless the record affirmatively shows that the evidence was not under oath, it will be presumed that the hearing officer acted legally.[22]

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[14] 1 BENJAMIN, *op. cit. supra* note 7, at 171.

[15] N.Y. PENAL LAW § 1620, defining perjury, includes testimony in "any action or proceeding, hearing, or inquiry, or any occasion in which an oath is required by law"; see People *ex rel.* Ostrander v. Chapin, 105 N.Y. 309, 11 N.E. 510 (1887).

[16] 155 N.Y. 40, 49 N.E. 257 (1898).

[17] People *ex rel.* Grogan v. York, 166 N.Y. 582, 60 N.E. 258 (1901); People *ex rel.* Hart v. York, 169 N.Y. 452, 62 N.E. 562 (1902); People *ex rel.* Maloney, 195 N.Y. 145, 87 N.E. 1070 (1909); Greenebaum v. Bingham, 201 N.Y. 343, 44 N.E. 853 (1911) (all of the foregoing cases, as well as the *Kasschau* case, involved the dismissal of police officers); Edelstein v. Gale, 5 App. Div. 2d 811, 170 N.Y.S.2d 208 (1958).

[18] Hecht v. Monaghan, 307 N.Y. 461, 474, 121 N.E. 2d 421, 428 (1954).

[19] People *ex rel.* Fordham Manor Reformed Church v. Walsh, 244 N.Y. 280, 155 N.E. 575 (1927).

[20] People *ex rel.* Ballard v. Moss, 38 App. Div. 630, 56 N.Y.Supp. 1032 (1899).

One aspect of the *Kasschau* decision—that the accused need not object to the failure to swear the witnesses—seems questionable when the accused person is represented by counsel as is the case so frequently today. In administrative proceedings, a party's counsel should not be allowed to leave such ''booby-traps'' in the record for use in case of an adverse determination, particularly in the absence of any prejudice.

Presumptions

Administrative factfinders make use of presumptions, such as the continuance of a condition.[23] However, such a presumption is inapplicable ''once the facts are fully developed.''[24]

Statutes may create certain presumptions of law as in the case of section 21 of the New York Workmen's Compensation Law, and the application of such a statutory presumption may cause trouble when the party, asserting the benefit thereof, fails to establish the facts necessary to its application. The presumption cannot establish the facts and create the presumption of law simultaneously.[25]

Note should be made that frequently the presumption of regularity on the part of public officers in the performance of their official duties is employed in administrative proceedings, particularly the review thereof.

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[21] People *ex rel.* Niebuhr v. McAdoo, 184 N.Y. 304, 77 N.E. 260 (1906).

[22] People *ex rel.* Ballard v. Moss, 34 App. Div. 475, 54 N.Y.Supp. 262 (1898).

[23] DeIonna v. Terry & Tench Co., Inc., 203 App. Div. 270, 197 N.Y.Supp. 131 (1922) (non-ownership of property—workmen's compensation claim); Carder Realty Corporation v. Perkins, 237 App. Div. 152, 261 N.Y.Supp. 819, *aff'd,* 261 N.Y. 634, 185 N.E. 770 (1933) (prevailing rate of wages—Industrial Commissioner).

[24] Berger v. Bodner Bakery, 8 App. Div. 2d 861, 862, 186 N.Y.S.2d 884, 885 (1959) (disability—workmen's compensation claim).

[25] McCormack v. National City Bank, 303 N.Y. 5, 99 N.E.2d 887 (1951).

Judicial Notice

Judicial notice of the rules and regulations of the principal departments of the state government may be taken;[26] however, before any regulation of a state department, board, bureau, officer, authority or commission may be effective, it must be filed with the Department of State.[27] When the regulation is local in applicability, the courts refuse to take judicial notice thereof,[28] the result of which is that the agency should not risk judicial notice of such local regulations. An inquiry seems appropriate to the advisability of this blanket practice. Should not the agency be allowed to take such notice and shift the burden of demonstrating any inaccuracy to the party claiming to be aggrieved? The suggested procedure would not shift the burden of proving knowledge of the rule when such knowledge must be established and is not conclusively presumed, as with the filed rules and regulations of state departments, etc. It is doubtful whether, in the absence of express statutory direction, the salutary provisions of section 344-a of the New York State Civil Practice Act will be extended to administrative agencies in view of its express language limiting its application to "any trial or appellate court."[29]

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[26] People v. Colbert, 263 App. Div. 36, 31 N.Y.S.2d 246 (1941) (a criminal proceeding, where notice was also taken of the location of state offices as well as of the regulations of the New York State Tax Department).

[27] N.Y. CONST. art. IV, § 8 and N.Y. EXECUTIVE LAW §§ 102–106; see Wertz v. Lobello, 1 App. Div.2d 416, 151 N.Y.S.2d 474 (1956).

[28] People *ex rel.* Browdy v. McDermott, 169 App. Div. 755, 155 N.Y.Supp. 323 (1915); Townley v. Bruckman, 168 Misc. 422, 5 N.Y.S.2d 899 (Sup. Ct. 1938); Fahey v. Wright, 256 App. Div. 474, 11 N.Y.S.2d 359 (1939); Josh v. Marshall, 33 App. Div. 77, 53 N.Y.Supp. 419 (1898).

[29] See Pfleuger v. Pfleuger, 304 N.Y. 148, 106 N.E.2d 495 (1952), a decision which was necessary to allow a Special Term of the Supreme Court of New York, to avail itself of section 344-a. Nor does the Judicial Council's report, which recommended this section, indicate any substantial ground for believing that there was any intention to include administrative

A cautious extension of such a practice to certain well-established agencies would certainly not be too adventuresome.

Judicial notice of matters of fact, such as governmental data, matters of nature and scientific facts, have not created any problem. Care should be taken to distinguish a broad field of controversy, described by the term, ''official notice.''[30]

Cross-Examination

No effort is required to find judicial statements to the effect that cross-examination is an element of fair play in administrative proceedings; it was so declared, as early as 1911,[31] as recently as 1954,[32] and concerning such diverse proceedings as the revocation of a hack driver's license by police officials[33] and a bank liquidation matter under the Insurance Law.[34] Such generalizations must be qualified when one recognizes the many instances of admissible evidence under the numerous exceptions to the hearsay rule;[35] when the administrative tribunal has accorded a party the opportunity to ''cross-examine . . . to a reasonable extent'';[36] when the determination is supported by the ''great weight of the credible evidence'';[37] or when the party is present and fails to exercise his right to cross-examine.[38]

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agencies within the term "any trial or appellate court." (See Ninth Annual Report of the New York Judicial Council, 1943, pp. 271–303.)

[30] See 1 BENJAMIN, *op. cit. supra* note 7, at 207–221 and 2 DAVIS, ADMINISTRATIVE LAW TREATISE, ch. 15, at 338–434.

[31] Greenebaum v. Bingham, 201 N.Y. 343, 347, 94 N.E. 853, 855 (1911).

[32] Hecht v. Monaghan, 307 N.Y. 461, 121 N.E.2d 421 (1954).

[33] *Ibid.*

[34] Matter of New York Title and Mortgage Co., 277 N.Y. 66, 13 N.E.2d 41 (1937).

[35] Ten chapters are required to list and discuss these exceptions in RICHARDSON, EVIDENCE, ch. X–XIX (8th ed. 1955).

[36] Greenebaum v. Bingham, 201 N.Y. 343, 347, 94 N.E. 853, 855 (1911); Friedel v. Board of Regents, 296 N.Y. 347, 73 N.E.2d 545 (1947); Epstein v. Cort Watch Co., 7 App. Div. 2d 663, 179 N.Y.S.2d 620 (1958).

[37] Day v. Board of Regents, 266 App. Div. 888, 42 N.Y.S.2d 803 (1943).

[38] Wood v. Kelly, 9 Misc.2d 102, 172 N.Y.S.2d 193 (Sup. Ct. 1957).

There can be no question that cross-examination is a valuable tool in the development of the truth. Unless the person, whose hearsay declaration is offered, is shown to be unavailable, a denial of this right should be grounds for annulment of an administrative determination if the aggrieved party demanded the right during the course of the proceeding and the evidence, which was not tested by cross-examination, was a necessary basis for the determination.[39] When cross-examination of a witness, who is present and has testified, is requested, a denial thereof should be ground for reversal if the questions are competent and material.[40]

Hearsay

From the problem of cross-examination to that of hearsay is not a full step; one aspect of the hearsay problem is the lack of an opportunity to cross-examine. There are many instances when, both at common law or by statute, hearsay is admissible and competent. Also it should be remembered that if no objection is made to incompetent hearsay (and experienced trial lawyers only make the objection to critical evidence), such hearsay will support a judicial finding.[41]

The early (1911) judicial veto[42] upon the admissibility of hearsay evidence in administrative proceedings has not stood the test of time. Another obstacle in the administrative use of hearsay, the ''legal residuum'' rule,[43] has been shaved down by statutory direction[44] and by judicial clarification[45] so that presently hearsay is admissible and an agency may "give such evidence its proper probative force."[46] There is still some life in the residuum rule; "hearsay evidence alone"[47] or "mere uncorroborated hearsay or rumor"[48] will not satisfy a reviewing court and no case can be made for an administrative decision, supported by hearsay, when alternative competent evidence is readily available.[49] Occasionally hearsay evidence is the only practical way to prove a particular fact and the courts recognize such situations without backward glances at the residuum rule.[50]

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[39] Katka v. Fletcher, 272 App. Div. 364, 71 N.Y.S.2d 179 (1947); *In re* Lipschitz, 259 App. Div. 640, 20 N.Y.S.2d 299 (1940); Ketcham v. Hotel Huntington, 8 App. Div.2d 889, 186 N.Y.S.2d 866 (1959); Reynolds v. Triborough Bridge and Tunnel Authority, 276 App. Div. 388, 94 N.Y.S.2d 841 (1950).

[40] People *ex rel.* Packwood v. Riley, 232 N.Y. 283, 133 N.E. 891 (1921).

[41] Matter of Findlay, 253 N.Y. 1, 170 N.E. 471 (1930); see Flora v. Carbeau, 38 N.Y. 111 (1868). See Humphrey v. Tietjen and Steffin Milk Co., Inc., 235 App. Div. 470, 257 N.Y.Supp. 768 (1932), where hearsay "was admissible, was not objected to, and was not disputed. It was treated by the parties as a statement of fact, and accordingly was not without significance. . . ." *Id.* at 471, 257 N.Y.Supp. at 769.

[42] Greenebaum v. Bingham, 201 N.Y. 343, 94 N.E. 853 (1911).

[43] Carroll v. Knickerbocker Ice Company, 218 N.Y. 435, 113 N.E. 507 (1916).

A police report,[51] an unverified certificate,[52] and affidavits of a consul general, a deceased workman's brother, a clergyman and an undertaker, and an unverified statement by a physician and an unverified certificate of a registrar of vital statistics[53] have been held to be not legal evidence and, therefore, should not be considered by the factfinder.

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[44] Section 118 of the New York Workmen's Compensation Law now provides that "Declarations of a deceased employee concerning the accident *shall* be received in evidence and *shall,* if corroborated by circumstances or other evidence, be sufficient to establish the accident and the injury." (Italics added.)

[45] Altschuller v. Bressler, 289 N.Y. 463, 46 N.E.2d 886 (1943).

[46] *Id.* at 470, 46 N.E.2d at 889.

[47] Stammer v. Board of Regents, 287 N.Y. 359, 365, 39 N.E.2d 913, 915 (1942).

[48] New York State Labor Relations Board v. Frank G. Shattuck Co., 260 App. Div. 315, 317, 20 N.Y.S.2d 949, 951 (1940).

[49] Reynolds v. Triborough Bridge and Tunnel Authority, 276 App. Div. 388, 94 N.Y.S.2d 841 (1950).

[50] *In re* Beckley, 218 App. Div. 352, 218 N.Y.Supp. 329, *aff'd,* 245 N.Y. 541, 157 N.E. 850 (1927); see BENJAMIN, *op cit. supra* note 7, at 176; People *ex rel.* Town of Preble v. Priest, 90 App. Div. 520, 85 N.Y.Supp. 481, *aff'd,* 180 N.Y. 532, 72 N.E. 1149 (1905).

[51] Jenson v. Fletcher, 277 App. Div. 454, 101 N.Y.S.2d 75, *aff'd,* 303 N.Y. 639, 101 N.E.2d 759 (1951); Stella v. MacDuff, 281 App. Div. 800, 119 N.Y.S.2d 483 (1953).

[52] Vassilakis v. Fairfax Hotel Co., Inc., 193 App. Div. 829, 184 N.Y.Supp. 774 (1920).

[53] Paola v. Porter Bros., 209 App. Div. 716, 205 N.Y.Supp. 281 (1924).

No error was found in the exclusion from evidence of a letter[54] and an investigator's report.[55] All such reports, letters, written statements and unverified certificates fall under the blight of the hearsay rule. Occasionally a statute authorizes the use of affidavits.[56]

Admissions

Extrajudicial admissions have been the subject of some consideration by our appellate courts in their review of workmen's compensation cases. Section 110 of the Workmen's Compensation Law provides in part, "Within ten days after the occurrence of an accident resulting in personal injury . . ., a report thereof shall be made in writing by the employer to the chairman of the workmen's compensation board upon blanks to be procured from the chairman for that purpose."[57] A refusal or neglect to make the report constitutes a misdemeanor.

When an employer, in complying with the law, submits a report, containing an admission against the employer's interest, the question is presented whether such an admission constitutes common law evidence. An extrajudicial admission is common law evidence and admissible "under a definitely recognized exception to the hearsay rule" and its competency "cannot be affected by the question whether the party making it had personal knowledge or merely information as to the fact admitted."[58] In *Anthus v. Rail*

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[54] Keller v. Montgomery Ward & Co., Inc., 2 App. Div.2d 402, 156 N.Y.S.2d 484 (1956).

[55] Premium Ice Co., Inc. v. Maltbie, 266 App. Div. 455, 43 N.Y.S.2d 71 (1943).

[56] NEW YORK WORKMEN'S COMPENSATION LAW § 121-a (proof of dependency in foreign countries).

[57] Such a provision has been in the New York Workmen's Compensation Law since 1914.

[58] Anthus v. Rail Joint Co., 193 App. Div. 571, 572, 185 N.Y.Supp. 314, 315, *aff'd,* 231 N.Y. 557, 132 N.E. 887 (1921). In rephrasing its decision the court said that "the law does not distinguish for the purposes of admissibility . . . between hearsay statements based on knowledge and hearsay statements based on other hearsay." *Id.* at 572, 185 N.Y.Supp. at 315.

Joint Co.,[59] the employer's report was executed by a clerk and was based upon the declarations of the deceased employee, whose hearsay declarations, if made to his claimant-widow or doctor, would have been insufficient to sustain the claim;[60] the admission established the occurrence of the accident in the course of the decedent's employment.

Such admissions "may be of fact or of law or of mixed fact and law."[61] In 1938, the court of appeals held in *Bollard v. Engel*[62] that an employee's accidental, fatal injuries arose out of and in the course of his employment. It was said that the employer's first report of injury was not without probative force merely because it was not made upon personal knowledge. The court cited *Gangi v. Fradus*[63] as its authority, where it was clearly held that admissions are not "probatively weak evidence, or have not a high degree of quality of proof," and that the jury should determine "their effect, or probative value or weight."[64] Accordingly, such an admission is not necessarily binding on the employer. Subsequent decisions did not question the *Bollard* opinion for a period of years.[65] However, in *Mietlinski v. Hickman*,[66] the court noted, in deciding that no employment relationship existed between an injured worker and his alleged employer upon whose property the claimant was working, that the alleged employer "had to file a notice of some kind in order to protect himself against any possible claim for compensation . . . and no other form of notice was provided by the compensation authorities" and "a conclusory statement by a layman on such a question [the alleged employer having described himself as being the worker's employer] is not entitled to substantial weight as an admission."[67] Another limitation of the *Bollard* rule was soon pointed out in *Aaron v. Burnham & Co.*:[68]

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[59] *Supra* note 58.

[60] Carroll v. Knickerbocker Ice Company, 218 N.Y. 435, 113 N.E. 507 (1916).

[61] Craciola v. Lewis, 233 App. Div. 437, 438, 253 N.Y.Supp. 752, 755 (1931).

[62] 278 N.Y. 463, 17 N.E.2d 130 (1938). In his first report, the employer had admitted that the employee had been injured in his regular occupation, but in a subsequent report he denied the fact.

[63] 227 N.Y. 452, 125 N.E. 677 (1920). See this opinion for a full consideration of judicial thought about admissions.

[64] *Id.* at 456, 125 N.E. at 679.

[65] Welz v. Markel Service, Inc., 266 App. Div. 757, 41 N.Y.S 2d 395, *aff'd*, 296 N.Y. 640, 69 N.E.2d 682 (1946); Campana v. Prudential Insurance Co. of America, 267 App. Div. 1007, 47 N.Y.S.2d 848 (1944); Brink v. Comstock Canning Corp., 278 App. Div. 867, 104 N.Y.S.2d 242 (1951); Matter of Kleid v. Carr Bros., 300 N.Y. 270, 90 N.E.2d 185 (1949).

[66] 285 App. Div. 306, 136 N.Y.S.2d 321 (1954).

> The Attorney-General relies upon alleged admissions in the employer's report of accident but this type of corroboration, so frequently invoked by the Attorney-General and tenuous at best, is wholly absent in this case. The employer was very careful in preparing the report not to make any admissions. The report stated in response to the inquiries as to the place of the accident and the nature of the injury that the employee 'claims' that an accident occurred at the office and that he 'claims working at desk & moved a teletype machine', and 'claims heart attack'. . . . The employer thus reported only what it had heard from others, after the decedent had told his story; it deliberately refrained from adopting or endorsing his version of the occurrence. No admission of the truthfulness of the decedent's declaration can be inferred from such a report. It only 'amounted to an admission that he had heard the statement which he repeated, and not to an admission of the facts included in it'.[69]

This limitation had been suggested in a dictum in an earlier negligence case, *Reed v. McCord*,[70] which was cited as authority. The appellate division later described employers' reports, containing admissions, as "greatly overemphasized in some cases"[71] and as not "constituting very strong evidence.''[72] However, in each instance, the court acknowledged and applied the *Bollard* rule. Although the court of appeals has not had occasion in a workmen's compensation case to draw these same limitations on the *Bollard* rule, there can be little doubt of its attitude, for in a negligence claim against the State of New York,[73] it has distinguished a statement made as one's own which would be competent as an admission, and a statement, constituting only a report made to the party in interest, which is not an admission.

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[67] *Id.* at 310, 136 N.Y.S.2d at 325.

[68] 2 App. Div. 2d 93, 154 N.Y.S.2d 652 (1956).

[69] *Id.* at 94–95, 154 N.Y.S.2d at 653–654.

[70] 160 N.Y. 330, 54 N.E. 737 (1899).

[71] Smith v. Venezian Lamp Co., 5 App. Div.2d 12, 13, 168 N.Y.S.2d 764, 766 (1958).

An admission may also be found against an employee whose attention is directed to a statement in the employer's report and who accepts an award based thereon.[74]

Confessions

Closely related to admissions is another form of hearsay, the confession. A confession is insufficient, standing alone, to convict the confessor in New York State;[75] other evidence to show the existence of the criminal act is necessary.[76] In a disciplinary proceeding against a New York City civil service employee, a confession was held to be ''substantial evidence'' which would support disciplinary action although criminal charges had been dismissed and the employee claimed that the confession was involuntary.[77] The opinion did not mention the requirement, in criminal cases, of corroboration. The court of appeals affirmed the employee's dismissal.[78]

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[72] Hoffman v. Grain Handling Co., Inc., 7 App. Div.2d 675, 676, 179 N.Y.S.2d 273 (1959).

[73] Cox v. State, 3 N.Y.2d 693, 148 N.E.2d 879, 171 N.Y.S.2d 818 (1958).

[74] Doca v. Federal Stevedoring Company, Inc., 308 N.Y. 44, 123 N.E.2d 632 (1954).

[75] N.Y. CODE OF CRIMINAL PROCEDURE § 395 (a "kissing cousin" to the residuum rule).

[76] People v. Deacons, 109 N.Y. 374, 16 N.E. 676 (1888).

[77] Berman v. Gillroy, 198 Misc. 369, 97 N.Y.S.2d 521, *aff'd,* 278 App. Div. 907, 105 N.Y.S.2d 902 (1951).

[78] 305 N.Y. 688, 112 N.E.2d 771 (1953).

Authentication of Documentary Evidence

The courts have shown a reluctance to depart from their traditional judicial methods of authenticating documentary evidence, whether public or private, in their oversight of administrative practices. When authentication could have been made by a witness who appeared at the hearing and there was a failure to do so, the courts have rejected the records which were included in the record.[79] When there is a failure to authenticate in accordance with the appropriate statutory provisions, the evidence will not be considered competent to satisfy the residuum rule,[80] although it may be sufficient as corroboration.[81] The statutory requirements of section 374-a of the Civil Practice Act must be satisfied for the admission of a business record.[82]

When documentary evidence is properly certified or when no objection is made to the certification, the reviewing court will raise no objection.[83] Although the trend of New York authority seems to require administrative authentication in accordance with common law practice or statutory provision, the fourth department of the appellate division has recently posed the question whether authentication in accordance with the New York Civil Practice Act is necessary for a mandatory revocation of a motor vehicle operator's license;[84] the majority opinion does not distinguish between administrative action taken after a hearing and such action where no hearing is required or held. It is suggested that, if this opinion stands, administrative "desk action" will be slowed by the necessity of obtaining "proof" to satisfy the court, although neither the administrator nor the licensee disputes the jurisdictional fact.

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[79] Stella v. MacDuff, 281 App. Div. 800, 119 N.Y.S.2d 483 (1953); Application of Tierney, 281 App. Div. 949, 120 N.Y.S.2d 27 (1953).

[80] Vassilakis v. Fairfax Hotel Co., Inc., 193 App. Div. 829, 184 N.Y.Supp. 774 (1920); Grillo v. Sherman-Stalter Co., 195 App. Div. 362, 186 N.Y.Supp. 810, *aff'd,* 231 N.Y. 621, 132 N.E. 913 (1921); DeIonna v. Terry and Tench Co., Inc., 203 App. Div. 270, 197 N.Y.Supp. 131 (1922). With regard to these cases, note should be made of the subsequent amendment to the WORKMEN'S COMPENSATION LAW § 121-a; but also see Paola v. Porter Bros., 209 App. Div. 716, 205 N.Y.Supp. 281 (1924), indicating the court's insistence upon compliance with special statutory provisions for authentication.

[81] Moran v. Rodgers & Hagerty, Inc., 180 App. Div. 821, 168 N.Y.Supp. 410 (1917); Lewis v. Charles F. Noyes Co., 278 App. Div. 222, 104 N.Y.S.2d 600 (1951).

[82] Roge v. Valentine, 280 N.Y. 268, 20 N.E.2d 751 (1939).

[83] Fake v. MacDuff, 281 App. Div. 630, 121 N.Y.S.2d 346 (1953); LaVictoire v. Kelly, 5 App. Div.2d 548, 173 N.Y.S.2d 543 (1958); Renkowski v. McDuff, 140 N.Y.S.2d 782, *aff'd,* 285 App. Div. 1152, 141 N.Y.S.2d 821 (1955).

Related Criminal Proceedings

Courts frequently cite the case of *Schindler v. Royal Insurance Company*[85] as authority for the proposition that an acquittal of a criminal charge does not bar disciplinary action, based upon the same or substantially similar facts. Prior thereto, several lower courts had considered the problem and rejected various contentions: that the administrative agency had no jurisdiction (unless and until there was a conviction) because the matter was of a criminal nature;[86] that the evidence, sustaining the administrative charge, would not support a criminal offense;[87] that the administrative charge constituted double jeopardy;[88] that there could be no administrative action following an acquittal[89] or dismissal of charges.[90] The *Schindler* case involved a claim for fire insurance by a plaintiff who had been convicted of presenting a false proof of loss; the court held that, while proof of conviction was admissible, it was not a bar to the maintenance of the action nor res adjudicata as to the plaintiff's fraud because the "dissimilarity of object, procedure and degree and elements of proof in the two trials forbid that the criminal judgment should be held to be decisive of the facts on which it is based." [91] This doctrine has been extensively developed by subsequent cases.[92] The rule of proof beyond a reasonable doubt, applied in criminal cases, does not apply in administrative proceedings. Nor does one police departmental trial bar a second trial on the same charges, which was described as a new trial or hearing.[93]

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[84] Quirk v. Kelly, 7 App. Div.2d 463, 184 N.Y.S.2d 761 (1959). Justice Halpern's dissent contains a valuable exposition of administrative evidence. The petitioner unfortunately passed away after the decision, and it may be that the court of appeals will never hear this case. If so, it may at least be hoped that its incalculable consequences will be confined to the twenty-two counties of the fourth department.

[85] 258 N.Y. 310, 179 N.E. 711 (1932).

[86] People *ex rel.* Fitzpatrick v. French, 32 Hun, 112 (1884).

[87] *Ibid.*

[88] People *ex rel.* Cunningham v. Bingham, 134 App. Div. 602, 119 N.Y.Supp. 417 (1909) (the entire criminal trial record was read into the administrative record).

[89] People *ex rel.* Wood v. Department of Health, 144 App. Div. 628, 129 N.Y.Supp. 255, *aff'd,* 202 N.Y. 610, 96 N.E. 1127 (1911).

[90] People *ex rel.* Restmeyer v. New York Telephone Co., 173 App. Div. 132, 159 N.Y.Supp. 369 (1916) (several criminal charges were involved).

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[91] Schindler v. Royal Insurance Company, *supra* note 85, at 313, 179 N.E. at 711–712.

[92] Weinstein v. Board of Regents, 292 N.Y. 682, 56 N.E.2d 104 (1944) (see 267 App. Div. 4, 44 N.Y.S.2d 917 (1943), for facts—refusal of committing magistrate to hold and failure of grand jury to indict—no bar to suspension of doctor's license); Cohen v. Board of Regents, 274 App. Div. 952, 83 N.Y.S.2d 449, *aff'd,* 299 N.Y. 582, 86 N.E.2d 106 (1949) (acquittal of dental mechanic for unlawful practice of dentistry, a misdemeanor—"no bearing upon or relevancy" to charge against dentist for aiding and abetting the mechanic); Berman v. Gillroy, 198 Misc. 369, 97 N.Y.S.2d 521, *aff'd,* 278 App. Div. 907, 105 N.Y.S.2d 902 *and* 305 N.Y. 688, 112 N.E.2d 771 (1953) (dismissal of sodomy charge—no bar to disciplinary action against civil service worker). Katz's Delicatessen, Inc. v. O'Connell, 302 N.Y. 286, 97 N.E.2d 906 (1951) (dismissal of criminal charge of gambling—no bar to administrative action for gambling, as defined in Alcholic Beverage Control Law); Lynch's Builders Restaurant, Inc. v. O'Connell, 303 N.Y. 408, 103 N.E.2d 531 (1952) (dismissal in magistrate's court—proof "not . . . less probative" in action by State Liquor Authority); Fay v. Lyons, 202 Misc. 789, 109 N.Y.S.2d 150, *aff'd,* 282 App. Div. 90, 121 N.Y.S.2d 878 (1953) (failure of authorities to prosecute indictment for over three years—no bar to administrative action even though indicted state employee aided state in prosecution of his co-conspirator for false claims against state); Hernigle v. MacDuff, 305 N.Y. 367, 113 N.E.2d 520 (1953) (no criminal charge after police investigation of two car accident—no bar to revocation of operator's license); Combes v. Kelly, 2 Misc.2d 491, 152 N.Y.S.2d 934 (Sup. Ct. 1956) (acquittal of driving while intoxicated—no bar to subsequent statutory revocation of car operator's license for refusing chemical test).

[93] Evans v. Monaghan, 306 N.Y. 312, 118 N.E.2d 452 (1954), where the

Some statutes either authorize or require administrative action after a criminal conviction.[94]

The readiness of most courts to permit administrative agencies to discipline subordinates or licensees despite failure of criminal action has not gone completely unopposed. The leading case in opposition to the weight of authority is *Bender v. Board of Regents.*[95] There the petitioner had testified in behalf of another in a criminal trial, which resulted in an acquittal; thereafter, administrative charges were brought accusing the petitioner of perjury at the criminal trial. This smacked of "persecution" and the court annulled the administrative determination. In annulling the revocation of a car operator's license, the court commented that no criminal charges had been filed against a licensee, involved in an accident, after a complete police investigation.[96] Arrests and dismissed summonses were insufficient bases to deny a reputable businessman a license to operate a poolroom which had been licensed in his name for 13 years.[97]

Criminal conviction may be used to impeach a witness in an administrative hearing.[98]

Corroboration

Evidence, corroborative of a respondent's testimony in a disciplinary proceeding, should be received, and its rejection constitutes prejudicial error.[99] Of course, the hearing officer should be allowed reasonable latitude to curtail such evidence once corroboration becomes cumulative.

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police officers who had been returned to duty after the first trial were retried when bookie, Harry Gross, decided "to talk."

[94] N.Y. VEHICLE & TRAFFIC LAW §§ 71(2), 71 (3a, 3c, 3d, 3f, 3g, 3h) and Ross v. MacDuff, 309 N.Y. 56, 127 N.E.2d 806 (1955); Cadieux v. MacDuff, 1 App. Div. 2d 360, 150 N.Y.S.2d 138 (1956).

[95] 262 App. Div. 627, 30 N.Y.S.2d 779 (1941).

[96] Sands v. Fletcher, 54 N.Y.S.2d 449 (Sup. Ct. 1945).

[97] Katz v. Moss, 184 Misc. 133, 55 N.Y.S.2d 131, *aff'd,* 269 App. Div. 854, 56 N.Y.S.2d 539 (1945).

[98] Fisher v. One Oak Dairy, Inc., 274 App. Div. 274, 82 N.Y.S.2d 461 (1948).

[99] People *ex rel.* Packwood v. Riley, 232 N.Y. 283, 133 N.E. 891 (1922).

The troublesome problem is whether administrative determinations may rest on evidence which has traditionally been thought to be either tainted, as in case of informers, criminals, or private detectives and prostitutes in divorce actions, or insufficient because of the nature of the evidence, as a confession, or the nature of the crime, as sexual accusations.

The uncorroborated testimony of an accomplice is insufficient to convict a fellow accomplice in a criminal action;[100] such corroboration is not required in an administrative proceeding, yet the "judicial conscience" will seek for "attendant circumstances" which together with the testimony of the accomplice will constitute "substantial evidence" although insufficient to sustain a criminal conviction.[101] Testimony of public employees, women investigating a doctor suspected of performing abortions, need not be corroborated in a disciplinary proceeding against the doctor.[102] An uncorroborated confession of sodomy by a civil servant will support his administrative dismissal,[103] but uncorroborated, incredible testimony of a rape complainant will not suffice to dismiss a police officer.[104]

Expert Testimony and Opinion Evidence

Expert testimony should undoubtedly be received in an administrative proceeding. The nature of many administrative proceedings requires evidence that only an expert can give.[105] The factfinder must, however, exercise his independent judgment in making his findings[106] and may disregard the testimony of his own impartial specialist so long as there is substantial evidence to support its determination.[107] The factfinder may also utilize his own expert knowledge, provided such knowledge is reflected in the record and the parties have an opportunity to meet it.[108] The record must contain a foundation for opinion evidence, whether expert[109] or lay;[110] otherwise it lacks probative force.

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[100] N.Y. CODE OF CRIMINAL PROCEDURE § 399.

[101] Evans v. Monaghan, 306 N.Y. 312, 118 N.E.2d 452 (1954). Whether the judicial conscience will *require* "attendant circumstances" and what the nature of such circumstances must be to satisfy the "substantial evidence" rule in New York is not settled. See the recent decisions in the appellate division, first department, Phinn v. Kross, 8 App. Div. 2d 132, 186 N.Y.S.2d 469 (1959), and Forge v. Kennedy, 8 App. Div. 2d 143, 186 N.Y.S.2d 478 (1959).

[102] Epstein v. Board of Regents, 295 N.Y. 154, 65 N.E.2d 756 (1946); Weinstein v. Board of Regents, 292 N.Y. 682, 56 N.E.2d 104 (1944) (see the complete factual statement in 267 App. Div. 4, 44 N.Y.S.2d 917).

[103] Berman v. Gillroy, 198 Misc. 369, 97 N.Y.S.2d 521, *aff'd,* 278 App. Div. 907, 105 N.Y.S.2d 902 (1951).

[104] DiNardo v. Monaghan, 282 App. Div. 5, 121 N.Y.S.2d 119 (1953).

Privileges

Commissioner Benjamin concluded that "the legal rules that exclude certain testimony on the ground of privilege

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[105] Owens v. McGovern, 309 N.Y. 449, 131 N.E.2d 729 (1956) (Workmen's compensation—medical causality).

[106] Johnson v. United States R.R. Administration, 193 App. Div. 580, 185 N.Y. Supp. 338 (1920); Dillon v. Schapp Beef Co., 254 App. Div. 790, 4 N.Y.S.2d 85 (1938).

[107] Kogan v. Schoen Printing Co., 276 App. Div. 935, 94 N.Y.S.2d 257 (1950).

[108] People *ex rel.* Fordham Manor Reformed Church v. Walsh, 244 N.Y. 280, 135 N.E. 575 (1927) (suggesting, in a zoning variation proceeding, that the zoning Board of Appeals could "[w]ithout any witnesses at all, . . . act of its own knowledge, for . . . it [was] made up of men with special qualifications"); Application of Palmer, 275 App. Div. 5, 87 N.Y.S.2d 655, *rev'd on other grounds,* 299 N.Y. 368, 87 N.E.2d 301 (1949) (a physician disciplinary proceeding—The factfinding Grievance Committee "may not use . . . [their own expert] knowledge as a substitute for proof of essential facts" although they could use the same "in the evaluation of evidence." It is suggested that this view does not utilize the administrative expertness, one of the basic reasons for the administrative process. Of course, such knowledge should be of record). There is a suggestion in Premium Ice Co., Inc. v. Maltbie, 266 App. Div. 455, 43 N.Y.S.2d 71 (1943), a rate-making case (another field for experts), that a technical matter could have been developed by experts privately employed by the litigating parties, the P.S.C. having rejected a report made by Commission employees; this view too seems to jettison a valuable aid. Again I hasten to recognize the necessity of evidence of record and the opportunity to rebut and the desirability of cross-examination if practical.

[109] Riehl v. Town of Amherst, 308 N.Y. 212, 124 N.E.2d 287 (1954); Bonomi v. Poirier & McLane Corporation, 1 App. Div. 2d 302, 149 N.Y.S.2d 616 (1956).

[110] Beebe v. Kelly, 185 N.Y.S.2d 425 (Sup. Ct. 1959).

(whether for the benefit of the witness himself or of some person who has made a privileged confidential communication to the witness) are apparently applicable to quasi-judicial proceedings . . . as in my judgment they should be . . . [A]ssuming the continuance of such privileges by the Legislature and the courts, . . . I see no valid reason why they should not generally be applied in quasi-judicial . . . proceedings.''[111] Apparently a privilege can be asserted by a party to an administrative controversy,[112] a witness,[113] or a legal representative.[114] The privilege may not be asserted to defeat the witness's appearance and should be ''availed of . . . when the questions are propounded.''[115]

The privileges are created by statutory or constitutional provisions. There being no such protection, confidential business records may be examined.[116] A record, declared confidential by statutory rule, is privileged.[117] An administrative agency may not preclude an inspection of its records by its departmental practice of periodic destruction thereof when known individual rights may be injured.[118] A privilege may be waived as by filing or prosecuting a claim for workmen's compensation benefits,[119] by being a public employee when a departmental rule requires an employee to testify,[120] or by making use of a public facility.[121]

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[111] 1 BENJAMIN, *op. cit. suprà* note 7, at 172–173.

[112] No case squarely decides this, but it is the basis of decisions which deal with waiver of privilege. See Petition of Maryland Casualty Co., 274 App. Div. 211, 80 N.Y.S.2d 181 (1948). City Council of City of New York v. Goldwater, 284 N.Y. 296, 31 N.E.2d 31 (1940), contains a very broad holding which could include administrative proceedings, but it should be noted that a legislative committee had subpoenaed an administrative, medical record. Administrative agencies derive their jurisdiction from the legislature, whose investigative committees are bound by the privilege against self-incrimination, Matter of Doyle, 257 N.Y. 244, 177 N.E. 489 (1931); nor can the executive department avoid this privilege, Dunham v. Ottinger, 243 N.Y. 423, 154 N.E. 298 (1926); Matter of Di-Brizzi, 303 N.Y. 206, 101 N.E.2d 464 (1951); Application of Bowers, 203 Misc. 653, 121 N.Y.S.2d 629, *aff'd,* 281 App. Div. 861, 119 N.Y.S.2d 920 (1953); Schiffman v. Bleakley, 46 N.Y.S.2d 353 (Sup. Ct. 1943). Of course, the judiciary will respect this privilege. Matter of Rouss, 221 N.Y. 81, 116 N.E. 782 (1917) (a disbarment proceeding).

[113] Hirshfield v. Hanley, 228 N.Y. 346, 127 N.E. 252 (1920).

[114] Matter of Lanham, 1 Misc.2d 264, 144 N.Y.S.2d 401 (Sup. Ct. 1955).

[115] Schiffman v. Bleakley, 46 N.Y.S.2d 353 (Sup. Ct. 1943).

[116] Matter of Dairymen's League Cooperative Association, Inc., 274 App. Div. 591, 84 N.Y.S.2d 749, *aff'd,* 299 N.Y. 634, 86 N.E.2d 509 (1949).

[117] Matter of Bakers Mutual Insurance Company of New York, 301 N.Y. 21, 92 N.E.2d 49 (1950).

Miscellany

Depositions, when expressly or impliedly authorized by statute, may be used.[122] Contradictory testimony, given in a prior proceeding, may be used to impeach the witness but may not be used as evidence in chief.[123] Evidence, obtained by eavesdropping, is "admissible in any disciplinary trial or hearing or in any administrative action, proceeding or hearing conducted by or on behalf of any state, municipal or local governmental agency.''[124] The exclusion of competent, relevant and material evidence is error.[125]

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[118] Schwartz v. Lubin, 6 App. Div.2d 108, 175 N.Y.S.2d 652 (1958) (departmental trial of employee).

[119] Matter of Maryland Casualty Co., 274 App. Div. 211, 80 N.Y.S.2d 181 (1948). "The privilege is deemed to have been waived as soon as evidence in his behalf is given of the claimant's injuries." *Id.* at 214, 80 N.Y.S.2d at 185.

[120] Matter of Delehanty (Sullivan), 202 Misc. 33, 115 N.Y.S.2d 602, *aff'd,* 280 App. Div. 542, 115 N.Y.S.2d 614 *and* 304 N.Y. 725, 108 N.E.2d 46 (1952); Matter of Delehanty (Goubeaud), 202 Misc. 40, 115 N.Y.S.2d 610, *aff'd,* 280 App. Div. 542, 115 N.Y.S.2d 614 *and* 304 N.Y. 727, 108 N.E.2d 46 (1952).

[121] Schutt v. MacDuff, 205 Misc. 43, 127 N.Y.S.2d 116 (Sup. Ct. 1954) (waiver implied by using public highway).

[122] Corporation Counsel of City of New York v. Smith, 1 N.Y.2d 813, 135 N.E.2d 603, 153 N.Y.S.2d 72 (1956), to the effect that the provisions of the Civil Practice Act do not authorize deposition in administrative proceedings. Is this a reflection of Benjamin's view that depositions are "neither necessary nor desirable in quasi-judicial proceedings"? 1 BENJAMIN, *op. cit. supra* note 7, at 166.

[123] Roge v. Valentine, 280 N.Y. 268, 20 N.E.2d 751 (1939), acknowledging this to be the rule and stating: "No sufficient reason appears why the court should reconsider now a rule of evidence so firmly established by the courts." *Id.* at 277, 20 N.E.2d at 754. Whether section 348 of the Civil Practice Act authorizing the use of former testimony under specified conditions is applicable to administrative proceedings is dubious in view of its language—"action" and "special proceeding"—and the decision in Corporation Counsel of City of New York v. Smith, 1 N.Y.2d 813, 135 N.E.2d 603, 153 N.Y.S.2d 72 (1956). *Cf. In re* Lynch, 227 App. Div. 477, 238 N.Y.Supp. 482 (1930) (a disbarment proceeding).

Conclusion

Is there any thread here? Can the hearing officer with a crowded calendar or the general practitioner with his pressing problems find any guides to chart his course of action in tomorrow's hearing? It seems safe to say that he will seldom commit reversible error by offering or receiving evidence; but this is where we started. The judicial opinions have not moved very far from this position. The common law view has been maintained on judicial notice, presumptions (except where statutorily created), necessity of the oath (and probably wisely since witnesses are probably no more or less truthful today than yesterday), admissions, authentication of documents, cross-examination, and expert testimony and opinion evidence. There has been some relaxation of the traditional rules with regard to confessions, necessity of corroboration and evidence, involving related criminal proceedings. Hearsay still does not receive its full probative value.

When a lawyer reads administrative evidence cases, he is at home. Their language is the language of Richardson and Wigmore. Can it be that the administrators have not persistently attempted to develop new techniques of administrative evidence and then tested them in the courts? Or has the bar ''captured'' the administrative process? An examination of techniques in administrative evidence is needed to fill out the picture before we can determine the next step, be it legislative, administrative or judicial.

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[124] N.Y. CIV. PRAC. ACT § 345-a. See section 353-a of the act, protecting confidential communications between attorney and client.

[125] New York Telephone Company v. Public Service Commission, 309 N.Y. 569, 132 N.E.2d 847 (1956).

The Development of an Adjudicative Process Within the Field of Administrative Law

Louis J. Naftalison *

Arthur T. Vanderbilt, Chief Justice of New Jersey, in his presidential address to the American Bar Association in 1938, declared that our administrative tribunals "constitute the outstanding legal development of the twentieth century."[1]

The administrative tribunals in unemployment insurance in New York came into being in the same year of 1938. Appropriately, at the customary age of maturity, we review the development of and evaluate the contributions to administrative justice made by the unemployment insurance adjudicative process in this state.

The General Growth of Administrative Law

The rapid expansion of the American economy and the emergence of a complex industrial society, so rapidly accelerated in the twentieth century, brought extensive legislation in new areas of government action in this state. Utilities were regulated. Social insurance was created. Civil rights were protected. Licenses were required in the fields of banking, insurance, agriculture, conservation, education, transportation, and motor vehicle operation. Controls were imposed on rents, the liquor industry and other businesses and occupations. Machinery was created to aid in the resolution of industrial disputes.

Government took on new and myriad responsibilities to administer these laws. These responsibilities did not and could not fit tightly into our constitutional concepts of separation of powers. New administrative agencies were created. Many were given powers to execute, to legislate and to adjudicate within the framework of such laws.

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[1] Vanderbilt, *United We Stand,* 24 A.B.A.J. 597, 600 (1938).

The creation of these administrative agencies did not diminish or affect the fundamental principle of our American democratic system of guaranteed individual rights. Not only can government not take away these inherent rights, but the American concept of state is that government must protect them and further them. We require that our public authorities act within the law which gives them office and also within the fundamental constitutional guarantees. Every act of legislation and every execution of such act is subject to challenge and scrutiny. While, of necessity, administrators must be given latitude of discretion in the discharge of their duties, the individual may challenge that exercise of discretion and demand that the administrator's actions be reviewed and be justified in terms of law.

When conflict arises in the administration of a law, the individual must be assured of objective, impartial and wholly independent consideration of his assertions or contentions. Traditionally, the individual's resort would be to the courts, but in administrative operation, that remedy is not appropriate to the situation. The courts are not equipped to deal with the hundreds of thousands of conflicts which arise in administrative law. Court procedure, formal and deliberate, is not geared to administrative cases which demand informality and speed.

The realization of these basic concepts of guaranteed individual rights in administrative law is found in the creation of administrative tribunals. Moreland Commissioner Robert M. Benjamin in his monumental and widely quoted report on "Administrative Adjudication in the State of New York" forcefully and succinctly stated the problem as being one of—

> . . . reconciling, in the field of administrative action, democratic safeguards and standards of fair play with

> the effective conduct of government. To state the problem in these terms is not to say that the elements to be reconciled are essentially opposite and conflicting. On the contrary, each of them should contribute to the fulfilment of the other. Government effective in accomplishing the purposes of a democratic society is itself a safeguard of the democratic tradition, if not indeed a condition of its survival. The safeguards and standards of fair play can themselves contribute in great measure to the effectiveness of democratic government.[2]

The organization and development of the administrative tribunals in the administration of unemployment insurance illustrate the attempts to realize what Commissioner Benjamin has said informally is the desired goal and that is, the combination of administrative effectiveness with standards of fair play.

The Development of the Unemployment Insurance System in New York

The Unemployment Insurance Law of New York was enacted in April, 1935.[3] New York State was preceded in this area of social insurance only by Wisconsin. Generally, the law provided that commencing with January 1, 1936, certain employers would be assessed with contributions or taxes, and that commencing with January 1, 1938, certain qualified employees would be entitled to collect benefits for stated periods of unemployment. In keeping with the pattern traced in another social welfare law of the state, workmen's compensation, and also in the English system of unemployment insurance, provision was made for the adjudication of disputes arising out of the administration of the law. The drafters of the New York statute were absorbed primarily in the complexities of fashioning a dual system calling for the collection of taxes and then for the payment of benefits. Pioneering in a virtually uncharted course in this country, the legislators tried to build well the foundations of a complicated structure of administration which would accomplish its purposes and which could withstand the expected attack on constitutional grounds. It is understandable, then, that only surface attention was given to any plan of adjudication which they considered then only a small part of the enormous and intricate system.

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[2] BENJAMIN, ADMINISTRATIVE ADJUDICATION IN NEW YORK at 9 (1942).

[3] N.Y. Sess. Laws 1935, ch. 468.

In August 1935, the federal Social Security Act became law.[4] Among many things, it provided for taxation of employers for purposes of unemployment insurance without providing for payment of benefits, but it further stipulated that such taxpayers could credit to the extent of 90 per cent against such federal tax, the amounts of contributions paid by them into an unemployment fund maintained under the Unemployment Insurance Law of a state which provided for benefits and was certified by the federal administration. One of the conditions which a state had to meet and still must meet to earn such certification is to provide in its law for "opportunity for a fair hearing, before an impartial tribunal for all individuals whose claims for unemployment compensation are denied."[5]

As expected, both the state and federal laws as to unemployment insurance were attacked as unconstitutional. In New York, the employer plaintiffs alleged that the law violated both the state and federal constitutions and, among other contentions, asserted that it deprived employers of property without due process of law. The court of appeals ruled the law constitutional.[6] The Supreme Court of the United States in a 4 to 4 decision affirmed without opinion.[7] The vote of the Supreme Court was a bit more decisive in the case of *Carmichael v. Southern Coal & Coke Co.*,[8] where the Alabama Unemployment Insurance Law was held constitutional by a vote of 5 to 4. The unemployment insurance sections of the Social Security Act were also held constitutional by the Supreme Court in the case of *Steward Machine Co. v. Davis* [9] by a vote of 5 to 4.

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[4] 49 Stat. 531 (1935).

[5] Social Security Act § 303(a)(3), 49 Stat. 531 (1935), 42 U.S.C. § 303 (1957).

[6] Chamberlin, Inc. v. Andrews, 271 N.Y. 1, 2 N.E.2d 22 (1936).

[7] 299 U.S. 515 (1936), *reargument denied* 301 U.S. 714 (1937).

[8] 301 U.S. 495 (1937).

Having survived these constitutional onslaughts, New York began adjudicating unemployment disputes early in 1938, soon after the payment of benefits began. The original New York law provided that the manager of the local office, where an unemployed employee's claim was filed, or his duly authorized deputy should determine the validity of the claim and the amount of benefits payable to the employee. It then provided that the employee, if dissatisfied with the finding of the manager or of his duly authorized deputy, or any other party affected by such finding, within ten days of such finding, could request to have the case reopened and then could have a hearing before the manager or his duly authorized deputy. The manager or his duly authorized deputy was required to render his decision within five days and to notify the employee and any other party affected who appeared at the hearing. The law further provided that within ten days after the decision of the manager or of his duly authorized deputy, an appeal to the Appeal Board could be taken by the employee or any other party affected who appeared at the hearing.[10]

On the tax side, the original law provided that any employer who claimed to be aggrieved by any determination, rule or order of the Industrial Commissioner could apply to the Commissioner for a hearing and that such hearing be held before the Commissioner, with right of appeal to the Appeal Board from any decision adverse to the employer.[11]

The original law,[12] like the present statute, provided for an Appeal Board of three to be appointed by the Governor. The Appeal Board was enlarged to five members in 1958.[13]

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[9] 301 U.S. 548 (1937).

[10] N.Y. LABOR LAW § 510 (1935).

[11] N.Y. LABOR LAW § 523 (1935).

[12] N.Y. LABOR LAW § 518 (1935) now N.Y. LABOR LAW § 534.

[13] N.Y. Sess. Laws 1958, ch. 977.

The Board was created and has always operated independently of the administration.

Cases before referees have risen to as high as 40,000 in one year and appeals have reached 6,600 in one year. Not only are these cases and appeals of prime importance to the particular claimant and employers, but the decisions of referees and the Board constitute precedents which serve to determine the rights of countless other claimants and employers. For example, a single test case involving the question of whether or not a claimant's benefit rights should be suspended during a period of seven consecutive weeks for loss of employment because of a strike, lockout or other industrial controversy in the establishment in which he was employed may affect as many as 5,000 fellow employees, similarly situated.

Claims for benefits were first filed on January 2, 1938. The numerous local offices throughout the state literally were inundated by a flood of claimants. These claims had to be processed and matched against employer's reports accumulated in Albany in the previous two year period. Notice had to be given to employers of the filing of claims by their former employees. Many claimants were found to be ineligible for benefits because they did not meet the requirements of the statute or were ruled to be disqualified to receive benefits for various reasons provided in the statute. Determinations of ineligibility or disqualification were issued on the initiative of the administrators or on the objection of employers. The claimants whose claims were denied were entitled to a fair hearing before an impartial tribunal as mandated by the Social Security Act. There was doubt that the deputization of local office administrators to hear claimant cases and the designation of the Commissioner to hold hearings concerning the determinations, which were issued by his designees in his name, satisfied the concept of an impartial tribunal.

The Organization of an Administrative Tribunal

The maze and complexity of the problems which beset the administrators in building a new and unprecedented system to collect taxes and pay benefits so engrossed them, that before 1938 little attention was given to organize adjudication personnel and procedures. In December, 1937, the writer was appointed by the Commissioner to organize a referee section throughout the state. Initially, three referees were appointed in New York City and three referees were appointed for the upstate area, all on a provisional basis. Some of the referees were not lawyers. Procedures had to be promulgated, a training program had to be formulated, forms had to be devised, space for hearing rooms had to be obtained, supporting personnel had to be engaged. There was little time for deliberate planning because the first hearings had to be scheduled commencing in February, 1938.

How were the first hearings in unemployment insurance disputes to be conducted? The lawyers among the original handful of referees could rely upon their court room training to guide them in interrogation, the application of the rules of evidence and the writing of decisions. The non-lawyers just did not know how to begin. The procedures of the English system, then current, of having a tripartite panel, consisting of a representative of the employers, a representative of labor and a civil service appointee could be of little aid to guide them. The Wisconsin experience was too remote. They found our closest neighbor in social insurance, workmen's compensation, of only slight help in procedural matters because of the basic difference in the nature of hearings.

We realized we were pioneers in a new area of adjudication. We had to feel our way. We had to experiment and learn through trial and error what was the best means to do administrative justice within the framework of the law and in consonance with the purposes and social implications of unemployment insurance. However, our lodestar was the ingrained concept of constitutional due process. Whatever mold the procedure would take after seasoned experience, the guiding motivation was to afford a fair hearing to all parties and to insure constitutional guarantees.

At first, the referees functioning throughout the state were almost entirely on their own in making judicial decisions. They had few pertinent precedents to guide them. The decisions in Wisconsin and in England were of some help, but they construed and interpreted different statutes. Employers' cases were heard originally by deputy commissioners or other designated officials, but occasionally, referees were authorized to act on behalf of the Commissioner.

The early cases in 1938 included many perplexing legal questions of far-reaching significance. Many employers resisted taxation, claiming they were exempt under various provisions of the law. Others refused to pay contributions on the premise that the persons who rendered services to them were not employees but independent contractors. The employers' cases were well prepared. They had able and outstanding legal representation. The Commissioner had no trained staff to prepare and represent the administration.

The referees found their roles as adjudicators difficult. Being regarded as deputies of the administrators whose rulings were being contested by claimants, referees hesitated to disagree with those who were technically their superiors. The busy and harassed administrators had little time to prepare cases. They sent to hearings only those staff members who could be spared from the avalanche of work involved in administering a new law which was fraught with every conceivable complexity attendant upon paying benefits to thousands of claimants queuing up at the local offices.

Independence for Unemployment Insurance Adjudicators

The Unemployment Insurance Advisory Council,[14] appointed by the Governor, composed of nine members, equally representative of the public, employers, and employees, came to the fore to rescue unemployment insurance adjudication from the morass of uncertainty, disorganization and ineffectiveness. In its annual report to the Governor and legislature for 1938, it recommended that referees be given statutory recognition and be made independent of the administration. Action came speedily at the legislative session in 1939. The law was amended to provide for the appointment of referees, subject to the regulations of civil service.[15] It was further provided that it should be the duty of a referee, under the supervision, direction and administrative control of the Appeal Board, to hear and decide not only disputed claims for benefits but also cases arising in tax disputes between employers and the Industrial Commissioner.[16] Parenthetically, New York is one of the few states where jurisdiction has been given to the adjudicators to hear both claimants' benefit cases and employer liability cases.

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[14] N.Y. LABOR LAW § 533.

Effective July 1, 1939, administrative justice in unemployment insurance became a cohesive unit with two internal levels of appeal for all parties: employee, employer, and the administration. Most significantly, referees became independent. The anomalous and incongruous system of requiring deputies to pass judgment on the official acts of their supervisors was abolished. The new arrangement was now in keeping with the established American concept of tripartite division of government, giving to the judicial phase complete independence from the legislative and the executive.

The story of this transformation was told by Professor Herman A. Gray of New York University and first chairman of the Unemployment Insurance Advisory Council in his article entitled, *The Adjudication of Controversies under the New York Unemployment Insurance Act, A Specific Problem in Administrative Justice and its Solution.*[17]

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[15] N.Y. LABOR LAW § 518(6)(a) (1935) as amended, N.Y. Sess. Laws 1939, ch. 662 (now N.Y. LABOR LAW § 535).

[16] N.Y. LABOR LAW § 523(1)(a) (1935) as amended, N.Y. Sess. Laws 1939, ch. 662 (now N.Y. LABOR LAW § 620(2)).

[17] 18 N.Y.U.L.Q. REV. 201 (1941).

Upon the Appeal Board's assumption of supervision over the referees, order evolved out of chaos. Rules and regulations governing practice and procedure before referees and the Appeal Board were promulgated and published. Referees were appointed from civil service lists after rigid examination. All but one are lawyers. Extensive training institutes were conducted. We wrote a comprehensive manual for referees which is virtually a Civil Practice Act in unemployment insurance. Later, we began the editing of a complete digest of all New York court cases in unemployment insurance. An index of all Appeal Board decisions was published. A list of citations of Board and court decisions similar to Shepard's Citations was issued. All of these publications are maintained today on a current, cumulative basis. To assist the referees, a competent supporting staff was engaged. Uniform procedures and forms were adopted. In summary, the Appeal Board established a thoroughly organized system within the broad outlines of the law to do substantial justice to all parties in the spirit of social insurance purposes.

Scope of Unemployment Insurance Adjudication

As indicated before, unemployment insurance referees have jurisdiction to hear and decide all unemployment insurance cases which are divided broadly into two categories; claimants' benefit cases and employers' liability cases.

Claimants' cases may be grouped generally into two divisions; eligibility for benefits and disqualification from receiving benefits. In order to be entitled to receive benefits, a claimant must file a valid original claim, which among other things, requires that he must have had at least twenty weeks of employment, covered by the law, in his base period, the fifty-two week period preceding the filing of such claim and that he must have earned remuneration averaging at least fifteen dollars per week in at least twenty weeks of employment in such fifty-two week period.[18] Alternatively, a valid original claim may be established by a claimant who had at least fifteen but less than twenty weeks of employment in his base period, in which he earned remuneration averaging at least fifteen dollars per week and also had at least forty weeks of employment in the period of one hundred and four consecutive weeks preceding the filing of his claim and had earned remuneration averaging at least fifteen dollars per week in at least forty weeks of employment in such period of one hundred and four weeks.[19]

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[18] N.Y. LABOR LAW § 527(1).

Not all employment is covered by the law. Generally, an employer is subject to the law, if he employs in all of his several places of employment in the state two or more persons in included employment on any day.[20] After January 1, 1960, employers will become subject to the law on the first day of the calendar quarter following a quarter in which their gross payroll is at least 300 dollars.[21] With regard to personal or domestic service in private homes, which are considered separately, an employer becomes subject to the law if he employs four or more such personal or domestic employees on any day.[22]

The law excludes from coverage generally, services performed entirely without the state,[23] agricultural labor,[24] service for an employer by his spouse or minor child,[25] service as a golf caddy,[26] service during all or any part of the school year or regular vacation periods as a part-time worker of any person actually in regular attendance during the day time as a student in an institution of learning,[27] employment subject to the Federal Railroad Unemployment

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[19] N.Y. LABOR LAW § 527(2).

[20] N.Y. LABOR LAW § 560(1).

[21] N.Y. Sess. Laws 1959, ch. 419.

[22] N.Y. LABOR LAW § 560(1).

[23] N.Y. LABOR LAW § 511(2)(3).

[24] N.Y. LABOR LAW § 511(6).

[25] N.Y. LABOR LAW § 511(7).

[26] N.Y. LABOR LAW § 511(8).

[27] N.Y. LABOR LAW § 511(9).

Insurance Act,[28] services as baby sitters,[29] services of minors engaged in casual labor,[30] employees of municipal corporations and other governmental subdivisions,[31] employees of entities organized and operated exclusively for religious, charitable, scientific, literary or educational purposes, no part of the net earnings of which inures to the benefit of any private shareholder or individual,[32] employees of veteran organizations enumerated in the Social Welfare Law,[33] and employees of federal instrumentalities (except under certain conditions imposed by Congress).[34] Certain exempt employers may apply voluntarily to become subject to the law.[35]

Employers subject to the law pay a basic contribution of 2.7 per cent [36] of the first three thousand dollars of defined remuneration paid to an employee in the calendar year.[37] This tax rate may be changed under the experience rating system of the state based upon certain employment and age of business factors.[38]

A claimant's benefit rate depends on his average weekly wage as defined in the law [39] based on earnings within his base period, which is the fifty-two week period preceding the filing of a valid original claim.[40] The benefits range from ten dollars per week to forty-five dollars per week.[41] They are paid within a claimant's benefit year which is the fifty-two week period following the filing of a valid original claim.[42] Normally, the maximum number of weeks during which benefits are paid in the benefit year is twenty-six, which need not be consecutive.[43] Partial benefits for one quarter, one half or three quarters of a weekly benefit rate are paid according to an "effective day" formula.[44] There is a waiting period of one week.[45]

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[28] N.Y. LABOR LAW § 511(10).

[29] N.Y. LABOR LAW § 511(12).

[30] N.Y. LABOR LAW § 511(13).

[31] N.Y. LABOR LAW § 560(4).

[32] N.Y. LABOR LAW § 560(4).

[33] N.Y. LABOR LAW § 560(4).

[34] N.Y. LABOR LAW § 560(6).

[35] N.Y. LABOR LAW § 561.

[36] N.Y. LABOR LAW § 570(1).

[37] N.Y. LABOR LAW § 518(1)(a).

[38] N.Y. LABOR LAW §§ 577, 588.

[39] N.Y. LABOR LAW § 590(2).

[40] N.Y. LABOR LAW § 520.

[41] N.Y. LABOR LAW § 590(7).

In order to qualify and to continue to receive benefits, a claimant must be totally unemployed and must also be available for and capable of employment.[46] A claimant must report as required to the insurance office and also to the employment office,[47] where a comprehensive and extensive placement service is maintained to obtain work for the unemployed.

A claimant may be disqualified from receiving benefits for forty-two consecutive calendar days if he voluntarily leaves his last employment without good cause.[48] A similar disqualification is imposed if a claimant loses his last employment through misconduct in connection with his employment.[49] A similar disqualification is imposed if a claimant, without good cause, refuses employment for which he is fitted by training and experience.[50] Benefit rights are suspended for a period of seven consecutive weeks if a claimant loses his employment because of a strike, lockout or other industrial controversy in the establishment in which he was employed.[51] A claimant who wilfully makes a false statement or representation to obtain any benefit forfeits his benefits for at least five and not more than twenty weeks for each offense.[52] The suspension of accumulation of benefit rights is not terminated by subsequent employment of the claimant and is not confined to a single benefit year.[53]

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[42] N.Y. LABOR LAW § 521.
[43] N.Y. LABOR LAW § 590(4).
[44] N.Y. LABOR LAW § 523.
[45] N.Y. LABOR LAW § 590(9).
[46] N.Y. LABOR LAW § 591(1)(2).
[47] N.Y. LABOR LAW § 590(1).
[48] N.Y. LABOR LAW § 593(1).
[49] N.Y. LABOR LAW § 593(3).
[50] N.Y. LABOR LAW § 593(2).
[51] N.Y. LABOR LAW § 592(1).
[52] N.Y. LABOR LAW § 594.

Besides the financial obligations imposed on employers by the terms of the law with respect to coverage, they are required to submit regular reports, maintain certain employment records, submit them to inspection on demand and to furnish special reports on request.[54] Interest at the rate of three quarters of a per cent a month is assessed for delinquent payments[55] and various penalties are imposed for failure to comply with various requirements.[56]

In broad outline, the foregoing are the benefits and disqualifications as to claimants and the obligations and responsibilities of employers. With a maximum monetary stake in benefits of 1,170 dollars per year, (benefits of forty-five dollars per week for twenty-six weeks) it is understandable that claimants will exert great zeal to obtain such benefits and employers who pay the tax therefor, in the first instance, will resist claims they believe to be unwarranted. The Industrial Commissioner, operating through a branch of the Department of Labor, the Division of Employment, is charged with the reponsibility to collect all taxes due and to pay benefits to those entitled thereto by the provisions of the law. His administrators conscientiously make determinations against claimants and employers according to their interpretation of the law. Naturally, the administration of the law is provocative of disputes. The statute makes provision for the disposition of such disputes.

Hearing Procedure

A claimant or an employer who is dissatisfied with a determination pertaining to a claim for benefits may request a hearing within thirty days after the mailing or personal delivery of such determination.[57] An employer who claims to be aggrieved by an Industrial Commissioner's determination, rule or order, not directly related to a specific benefit claim may apply for a hearing within twenty days after mailing or personal delivery of such determination, rule or order.[58]

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[53] N.Y. LABOR LAW § 592(3).

[54] N.Y. LABOR LAW § 575.

[55] N.Y. LABOR LAW § 570(3).

[56] N.Y. LABOR LAW §§ 570(4), 575(2), 630–635.

Requests for hearings by claimants or employers are processed by the administration and transmitted to the referee section. It is the duty of a referee, under the supervision, direction and administrative control of the Appeal Board, to hear and decide all disputes in accordance with the Unemployment Insurance Law. The nature of such disputes is commented on by Commissioner Benjamin in his report:

> Unemployment insurance presents a further complexity. The State may be one of two parties in either of two ways: it may be a party adverse to the claimant in a case involving a disputed claim for benefits; it may be a party adverse to the employer in a case involving the employer's liability for contributions to the unemployment insurance fund. There are, however, also cases of the disputed claim type that involve all three interests, the claimant's, the employer's, and the interest of the State in the maintenance of the unemployment insurance fund. Here again . . . the State acts through more than one agency. The Unemployment Insurance Appeal Board, and the referee subject to its administrative control, decide cases; in various respects the State's interest is represented by the Division of Placement and Unemployment Insurance [now Division of Employment] of the Department of Labor.[59]

An employer who requests a hearing in certain claimant cases must deposit ten dollars, which is returned to him if the referee modifies or overrules the determination to which the employer objects. If the determination is affirmed, the deposit is not returned.[60]

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[57] N.Y. LABOR LAW § 620(1).

[58] N.Y. LABOR LAW § 620(2).

[59] BENJAMIN, ADMINISTRATIVE ADJUDICATION IN NEW YORK at 26–27.

[60] N.Y. LABOR LAW § 620(1)(c).

Every hearing as provided by the law must be held by a referee in the first instance.[61] Within five days after the hearing is concluded, the referee must render a written decision containing his reasons therefor and notice of such decision given to the Industrial Commissioner, the claimant or employer and to any party affected thereby who appeared at the hearing.[62]

Appeal Procedure

In benefit cases, the claimant and the employer, provided he appeared at the hearing, may appeal to the Appeal Board within twenty days after the mailing or personal delivery of notice of the referee's decision.[63] Within the same period, the Industrial Commissioner may appeal to the Appeal Board, regardless of whether or not he appeared or was represented at the referee hearing.[64] An employer who files a notice of appeal in certain benefit cases must deposit twenty five dollars which is returned to him if the referee's decision is modified or overruled by the Appeal Board. If the referee's decision is affirmed, the deposit is not returned.[65]

In employer cases, the employer may appeal to the Appeal Board, provided he appeared at the hearing, within twenty days after the mailing or personal delivery of notice of the referee's decision.[66] No deposit on such appeal is required. The Industrial Commissioner may appeal within the same period, regardless of whether or not he appeared or was represented at the referee hearing.[67]

The Appeal Board may decide any case appealed to it on the basis of the record and of evidence previously submitted, or it may, in its discretion, hear argument or hold a further hearing or remand the case to a referee for such purposes as it may direct. The Board may affirm or reverse, wholly or in part, or may modify the referee's decision. Written notice of the Board's decision, together with the reasons therefor, is sent to the Industrial Commissioner and any other party affected thereby, who appeared at the hearing before the referee.[68] The law empowers the Board to establish suitable rules and regulations governing the manner in which disputes and appeals shall be presented before referees and the Appeal Board and the conduct of hearings before referees.[69] The Appeal Board and the referees, in hearings and appeals, are not bound by common law or statutory rules of evidence or by technical or formal rules of procedure but may conduct the hearings and appeals in such manner as to ascertain the substantial rights of the parties.[70] The decision of a referee, if not appealed from is final on all questions of fact and law. A decision of the Appeal Board is final on all questions of fact and law and, unless appealed from, is final on all questions of law.[71]

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[61] N.Y. LABOR LAW § 620(3).

[62] N.Y. LABOR LAW § 620(3).

[63] N.Y. LABOR LAW § 621(1).

[64] N.Y. LABOR LAW § 621(1).

[65] N.Y. LABOR LAW § 621(1).

[66] N.Y. LABOR LAW § 621(2).

[67] N.Y. LABOR LAW § 621(2).

Appeals to the Courts

Within thirty days after the mailing or personal delivery of notice of a decision of the Appeal Board, the Industrial Commissioner or any other party affected thereby who appeared at the appeal before the Board may appeal questions of law involved in such decision to the appellate division of the supreme court, third department. Precedence is given such appeals in the appellate division, similar to the practice which prevails in workmen's compensation appeals. The Industrial Commissioner is represented in court by the Attorney General. An appeal may be taken to the court of appeals in the same manner provided for an appeal to that court in civil actions.[72] The law provides for undertakings on appeal in certain appeals by employers.[73]

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[68] N.Y. LABOR LAW § 621(3).

[69] N.Y. LABOR LAW § 622.

[70] N.Y. LABOR LAW § 622(2).

[71] N.Y. LABOR LAW § 623.

[72] N.Y. LABOR LAW § 624.

[73] N.Y. LABOR LAW § 625.

The procedure provided for hearings before referees and for decisions thereon and for appeals therefrom, first to the Appeal Board and thereafter to the courts, is the sole and exclusive procedure, notwithstanding any other provision of law.[74]

The foregoing delineation of the law and the adjudicative procedures merely outlines the statutory framework within which administrative justice functions in the field of unemployment insurance. These twenty-one years have seen healthy growth and expansive development, not only as to the procedural apparatus but as to decisional compliance with standards of fair play. The experience has undoubtedly made useful contribution to the adjudicative process in this state.

The Responsibilities of Unemployment Insurance Adjudicators

We must do substantial justice as the statute mandates, not in the abstract, but in the realistic interpretation of a social welfare law. Government, both federal and state, has seen fit to erect firm pillars of social insurance to stand as bulwarks against the exigencies of life over which no one has control. We have learned that wage earners, no matter how well paid, cannot accumulate sufficient reserve to meet the common catastrophic events of accidents on the job, illness, loss of employment, old age or death of bread-winners. We have devised, therefore, these various systems of social insurance which enable us to plan ahead, share our risks, and buy some security for a small premium. We know that unemployment generally is not due to a mere unwillingness to work but is caused by many phenomena over which neither industry nor labor has sole control.

Covered workers are entitled to unemployment insurance as a right given to them by the law and not as a dole. When benefits are denied to them, they have a right to challenge the governmental agency which withholds such benefits.

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[74] N.Y. LABOR LAW § 626.

That right is preserved to them by our system of administrative justice. They are entitled to speedy justice at a time when they need those benefits and not when the emergency of unemployment has passed. While such justice must be swift, it must be complete with all of the safeguards we have erected in our structure of due process. Administrative justice must be on the level of the working man, stripped of the accoutrements of court battles. It must be humane. It must be reasonable. The constant, guiding aim must be to pay benefits justly due a claimant within the framework and purposes of the statute. The rights of employers as well must be protected. We must work to make living administrative justice as fresh as today's headlines and as permanent as our guaranteed constitutional rights.

Conformance to Due Process

In our unemployment insurance tribunals, justice is done within the well established concepts of due process. There is adequate notice of hearing; in practice, at least ten days before the scheduled date. The notice of hearing lists all parties and known witnesses. It states briefly the purpose of the hearing. It advises all parties to bring to the hearing, generally, all evidence which has a bearing on the case and specifically, designated papers and records directly relevant to the case. It informs all parties that witnesses, if any, may be brought to the hearing. It bears a legend that no adjournment of the hearing will be granted unless valid reason is received in writing at least four days prior to the hearing. This is to emphasize the need for speed in adjudication and to discourage unnecessary delays. On its reverse side the notice advises the employer that under section 620.1b of the law, the service of the notice makes the employer a party to the proceeding, entitled to be heard on the questions whether the employer is subject to the law, whether he is liable for taxes, whether he has complied with obligations imposed upon employers by the law and on any other issue related thereto. He is further advised that under the law the referee's decision will not be limited to the particular claimant's case but will be a general determination of the questions and issues listed with respect to all of his employees for the purposes of the law, and that such decision will be conclusive and binding upon him, subject to his right to appeal, which right he can assert only if he appears at the hearing. It must be explained that the legislature originally enacted this procedure for the purpose of avoiding multiplicity of hearings in cases affecting the status of persons as employees, so that the disposition of the question of coverage of a single employee would be determinative of the status of all other employees similarly situated in the employer's establishment.

The Labor Law gives the Appeal Board and the referees the power of subpoena.[75] We use it freely. We liberally grant requests by parties for the issuance of subpoenas. The staff serves all subpoenas. The statutory fees scheduled in the Civil Practice Act are paid. We established an innovation many years ago by using subpoenas served by registered mail to bring in employers and witnesses who fail to respond to notices of hearing in benefit cases. This step was made necessary by the volume of cases. The mail subpoena differs from the one served in person in that the penalty clause is omitted, and, in lieu thereof, it contains a legend to the effect that for a failure to attend, the case may be decided upon the evidence of other parties or witnesses. The results have been amazing. A vast number of these mail subpoenas has been honored by the persons served. There have been tremendous savings in time, money and effort by the use of this device.

The referees and the Appeal Board have the power to order the taking of testimony without the state.[76] Such depositions are scheduled before unemployment insurance adjudicators in such other jurisdictions.

Parties have the right to be represented by an agent who may be an attorney or a layman. However, no fees for services rendered by such agent shall be allowable or payable unless such agent is an attorney and counsellor-at-law.[77] Attorneys' fees may not exceed ten per cent of the benefit allowed and must be approved by the Appeal Board.[78] Provision is made for the payment of attorneys' fees and disbursements in appeals taken to the courts where the Appeal Board decision is in favor of the claimant.[79] All persons at a hearing are entitled to confront and be confronted by witnesses on the other side of the controversy. Parties have the right to examine and rebut adverse parties and witnesses, either in person, under the guidance of the adjudicator, or through counsel or agent. Oral argument is permitted where requested or directed.

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[75] N.Y. LABOR LAW § 39.

[76] N.Y. LABOR LAW § 39.

All testimony is taken under oath or by affirmation. A verbatim record of the proceedings is made by a reporter. Minutes are transcribed for appeals or on order of parties. The charges made to parties who purchase minutes are nominal. However, all transcripts of minutes and files are open for inspection by parties or their representatives. In the interests of speed and brevity, the adjudicator may go ''off the record'' for the purpose of examining voluminous books and records or to straighten out irrelevant complications. However, the adjudicator is in duty bound to summrize on the record the actions taken or the information obtained off the record.

Exhibits are received and marked in evidence and then retained in the file. If parties require the immediate return of such exhibits, they are either summarized or read into the record.

An adjournment of a hearing may be directed or granted by the referee or Appeal Board in his or its discretion.[80]

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[77] N.Y. LABOR LAW § 538(1)(a)(b).

[78] N.Y. LABOR LAW § 538(1)(c).

[79] N.Y. LABOR LAW § 538(1)(d).

[80] Matter of Tiebout, 286 App. Div. 1057, 1058, 144 N.Y.S.2d 864, 865 (1955), "... [T]he determination to grant or deny the adjournment sought

In such event, explanation is given to the parties and representatives of the reason for such adjournment. It is established policy that no case shall be delayed unreasonably. The notice of adjourned hearing bears the legend that unless parties or their representatives are present at such hearing, the case may be closed or decided and appropriate action taken thereon.

A written decision, giving the findings of fact and the opinion, is required in every case and must be served on all parties and representatives.[81] However, the findings of fact must be supported by the evidence.

The notice of decision advises all parties of their statutory right to appeal to the Appeal Board. Specific instructions are given as to how such appeals may be taken by either claimants or employers, with appropriate references to the sections of the law governing appeals. Further, claimants are advised that if they have any questions or doubts about the meaning of the decision, they should take it to the local office within the statutory appeal period of twenty days and inquire as to what else must be done. All parties are advised that they will receive a notice of receipt of the appeal directly from the Appeal Board after any appeal is taken. The Appeal Board promptly issues a notice as soon as an appeal is received advising all parties and their representatives that within seven days they may submit by mail to the Board any written statements or briefs in support of or in opposition to the appeal, or may make applications to the Board for a further hearing or for other relief desired. Such statements or briefs must be submitted in duplicate so that the Board may forward a copy to the opposing side. All Appeal Board notices of decisions advise parties of their right to appeal to the appellate division, third department, so as to provide for judicial review of Appeal Board decisions.

[by the employer] under the facts of this record was well within the discretion of the referee."

[81] N.Y. LABOR LAW §§ 620(3), 621(3).

Hearing and Appeal Procedure

As empowered by the law,[82] the Appeal Board has promulgated and issued *Rules and Regulations Governing Practice and Procedure before Referees and Appeal Board.* These rules and regulations have been in effect since July 1, 1939, and have been revised several times to reflect changes in the law and developments in the field of administrative law. They cover, among others, the subjects of conduct of referee hearings, referees' decisions, appeals, conduct of appeals and Board decisions. Copies of the rules and regulations are available to the public without charge.

Most claimants and even many employers are not represented by counsel at hearings. The obligation is therefore placed upon the adjudicator to protect and safeguard their rights and to develop all of the essential facts relative and material to their respective contentions. We also make administrative justice adaptable to the particular conditions of parties. Many years ago we initiated a procedure then novel to litigation. In New York City, we accommodate claimants who cannot attend hearings during regular hours because they have returned to work at the time their cases are scheduled, and we also accommodate employers of small establishments who cannot leave their places during usual business hours. Hearings are then scheduled in the evenings to enable such parties to avoid loss of wages or business. We have held hearings in homes and hospitals to accommodate claimants who are incapacitated at the time of hearing.

Professor Larson has said in his outstanding, encyclopaedic work on workmen's compensation in discussing the relation of adjective law in compensation cases to administrative law generally, "in the spectrum of administrative agencies, . . . the compensation commission while deciding controverted claims is as far toward the judicial end of the spectrum as it is possible to go without being an outright court."[83] We recognize that responsibility in unemployment insurance. We appreciate that our tribunal is an extension of our judicial system. We strive to emulate the courts in their mission to do substantial justice to all, without regard to power or position, without fear or favor and in consonance with the cherished traditions of American jurisprudence. As a component part of administrative law in this country, we strive to render justice speedily, bringing satisfaction to workers and employers intimately and informally in a specialized field which touches their welfare and their obligations.

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[82] N.Y. LABOR LAW § 622.

As in many other branches of administrative justice, our law provides that the Appeal Board and the referees, in hearings and appeals shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure but may conduct the hearings and appeals in such manner as to ascertain the substantial rights of parties.[84] This opens the doors wide, perhaps too wide for the courtroom trained lawyer whose first contacts with such procedure make him uncomfortable. He misses the restrictions of the courtroom. The freedom of the hearing room may chafe him. Although admonished that the strict rules of evidence do not apply, he intuitively objects that questions are incompetent, irrelevant and immaterial, moves to strike out answers or moves to dismiss the case against his client and takes exceptions freely. He is advised that these technical tactics are unnecessary and that all of his client's rights are preserved.

The unemployment insurance adjudicator, within reasonable bounds, admits all offers of evidence: hearsay, opinions, irrelevancies. He knows that it makes for speedier justice to get the whole story from the lips of laymen without the impedimenta of objections and arguments over admissibility of evidence. The issues are usually limited, confined to a specialized area of inquiry. With the pressure of a calendar of from eight to ten cases a day, the referee must get to the heart of the controversy quickly. He has discovered that the pertinent facts can be found much more readily without the attack and defense tactics of court procedures. The interrogation must be streamlined and reduced to the lowest common denominator commensurate with the intelligence and articulateness of the claimant. The referee revels in the luxury of asking the choicest one word question "Why?", a practice which is usually barred in a court of law. We find the answer thereto invariably revealing and relevant. Unemployment insurance referees are also instructed to ask one simple question at the end of every case. "Have you anything else to say?" The responses thereto are astounding. Most claimants are conditioned by motion picture and television portrayals of courtroom dramas to believe that they must answer in "yes or no" fashion. They are often reluctant to speak out freely. When this final question is asked, usually the whole story pours out and the referee then learns truly the basis for the claimant's objection to the disqualification imposed against him.

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[83] 2 LARSON, THE LAW OF WORKMEN'S COMPENSATION 316 (1952).

[84] N.Y. LABOR LAW § 622(3).

Substantial Evidence Rule

While the adjudicator accepts all proof, he knows the value of evidence. He knows the rules of evidence, their genesis and rationale. He knows that a leading question which suggests the answer is usually worthless. He knows that opinions are interesting but not controlling. He knows that the prize of victory does not belong to the glib, articulate, verbose witness. He winnows the wheat from the chaff. He is guided by the substantial evidence rule laid down by the court of appeals in the case of *Stork Restaurant, Inc. v. Boland*[84a] affecting administrative tribunals:

> A finding is supported by the evidence only when the evidence is so substantial that from it an inference of the existence of the fact found may be drawn reasonably. A mere scintilla of evidence sufficient to justify a suspicion is not sufficient to support a finding upon which legal

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[84a] 282 N.Y. 256, 26 N.E.2d 247 (1940).

> rights and obligations are based. That requires 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' (*Consolidated Edison Co. v. National Labor Relations Board,* 305 U.S. 197, 229.) The same test is applied in trials before a court and jury. Evidence which is sufficient to require the court to submit a question of fact to a jury is sufficient to support a finding by the administrative board. . . .
>
> There is often greater difficulty in applying the test than in formulating it. The evidence produced by one party must be considered in connection with the evidence produced by the other parties. Evidence which unexplained might be conclusive may lose all probative force when supplemented and explained by other testimony. The Board must consider and sift all the evidence— accepting the true and rejecting the false—and must base inferences on what it has accepted as true. Choice lies with the Board and its finding is supported by the evidence and is conclusive where others might reasonably make the same choice.[85]

Adjudicative Process Concepts

Unemployment insurance adjudication has swept aside other courtroom techniques in its striving to do substantial justice. We do not follow strict rules as to order of proof. We do not regard it as a rigid matter. It is dependent upon the circumstances in each case. Rule 5a of the *Rules and Regulations Governing Practice and Procedure before Referees and Appeal Board* provides:

> The referee shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure. The referee shall conduct the hearing in such order and manner and with such methods of proof and interrogation as he deems best suited to ascertain the substantial rights of the parties. All parties shall be accorded full opportunity to present such testimony and to introduce documentary or other evidence as may be pertinent. At the commencement of the hearing, the referee shall identify all persons present and shall outline briefly the issues involved.

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[85] *Id.* at 273–274, 26 N.E.2d at 255.

In our hearings, no one has the burden of proof or of going forward with the evidence. These become cumbersome devices of procedure unsuited to our purposes. They belong in courts of law where judges and trained, experienced counsel make the rules of evidence function. If an adjudicator should impose upon an unrepresented, illiterate claimant the burden of proof to establish his right to a benefit check, the purpose of the law may suffer defeat. A hearing before a referee is virtually the second appeal stage. The claimant's right to benefits has been denied. An employer has been assessed with contributions. Who can say who is the plaintiff, as in a court proceeding? Is it the Industrial Commissioner who issued the determination? Is it the employer who makes a charge against a claimant? Is it the claimant who seeks benefits? Is it the employer who objects to the assessment? The plaintiff concept just does not fit.

The rules of burden of proof or the burden of going forward with the evidence belong in courts of law. There it is fair to require a plaintiff in prescribed fashion to submit a preponderance of the credible proof to obtain from the defendant money, property, or whatever else he seeks. In administrative tribunals, technical burdens handicap the unrepresented, uninformed claimants or employers. A liberal interpretation of the statute, reliance upon precedents of which the claimant or the employer knows nothing, and the application of good sense may dictate that he should prevail. If a claimant's claim is denied merely because, through inability or ignorance, he did not carry the legal burden of proof, he, his family and the community may suffer the economic consequences of unemployment which the statute seeks to avoid. For similar reasons an employer should not be burdened with taxes he may not owe because of technical burdens he cannot carry.

Unhampered by the restrictions of common law or statutory rules of evidence or technical rules of procedure, we seek the facts quickly and informally. We try to create an atmosphere of ease rather than hostility for the claimant and the employer. At the commencement of every hearing, the referee, pursuant to established rules of procedure, introduces himself, explains his role as an independent adjudicator, identifies all persons in the hearing room and then outlines briefly the issues involved. This helps immeasurably to streamline the hearing and avoids surprises.

Our statute has given us another excellent tool to do substantial justice. Lawyers know how inexorable are the provisions concerning time within which to appeal to a higher tribunal. Appeals are dismissed as a matter of course if they are untimely. The Unemployment Insurance Law provides that the Appeal Board, on its own motion or on application duly made to it, may modify or rescind a referee's decision at any time.[86] Further, the Appeal Board, on its own motion or on application duly made to it, may modify or rescind its own decision at any time.[87] This concept of continuing jurisdiction was taken from the Workmen's Compensation Law and has proved with us, as with that other social welfare agency, a potent instrument of justice.

Judicial Review of Unemployment Insurance Adjudications

a) *Appeal Board Powers*

How has the Appeal Board fared in the courts in its interpretation of its responsibilities, powers and functions as an instrument of administrative justice? The exercise of the Board's discretion in denying and employer's application to reopen and reconsider a prior Board decision in a tax liability case was upheld in *Matter of Crowley*.[88] The court sustained the right of the Board under the law to reconsider its prior decision and reverse itself.[89] The Board has the power to rescind two separate, conflicting referee decisions affecting the same employer and remand both cases to a referee for a rehearing and for the rendition of a new decision. A writ of prohibition sought by the employer to restrain the Board from making such order of remand was denied, the court holding that the employer's remedy was by appeal from the referee to the Board and thence to the appellate division, third department.[90] An appellant to the appellate division cannot bring up for review previous decisions of the Appeal Board. These are final under the law and not intermediate or interlocutory orders within the scope of section 580 of the Civil Practice Act, and in the absence of timely appeal from such decisions, they may not be reviewed by the court.[91] The argument that since the referee had the advantage of seeing and hearing the witnesses before him, the Board's reversal of the referee's decision was not supported by substantial evidence was rejected. The court held that the Board's decision on questions of fact is made final by the statute, if supported by substantial evidence, and not the decision of the referee who acts under the supervision, direction and administrative control of the Board.[92]

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[86] N.Y. LABOR LAW § 620(3).

[87] N.Y. LABOR LAW § 534.

[88] 275 App. Div. 977, 90 N.Y.S.2d 153 (1949).

[89] Matter of Rinaldi, 281 App. Div. 1051, 121 N.Y.S.2d 155 (1953).

b) *Finality of Decisions on Facts*

Section 623 of the law provides that the decision of the Appeal Board shall be final on all questions of fact. The courts have upheld uniformly the finality of such fact finding by the Board. The court of appeals found no substance in an employer's contention that section 623 is unconstitutional and violates Article I, section 6 of the State Constitution and Amendments V and XIV of the United States Constitution and Article I, section 1 of the Bill of Rights insofar as it denies to the courts any power to reverse the Appeal Board's determinations on questions of fact.[93]

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[90] Fayetteville Cemetery Ass'n v. McGarry, 202 Misc. 141, 117 N.Y.S.2d 63 (Sup. Ct. 1952).

[91] Matter of Waterman, 285 App. Div. 1106, 139 N.Y.S.2d 529 (1955).

[92] Matter of Pokutycki, 281 App. Div. 724, 117 N.Y.S.2d 745 (1952).

[93] Matter of Rumsey Mfg. Corp., 296 N.Y. 113, 71 N.E.2d 426 (1947), *reversing* 270 App. Div. 973, 62 N.Y.S.2d 136 (1946).

The court of appeals reversed the appellate division and reinstated a decision of the Appeal Board because the reversal by the appellate division was not upon the facts, and no error of law was found in the Board's decision.[94]

A frequent and perplexing problem presented to the courts is to determine whether a person is an employee or an independent contractor. Since the structure of unemployment insurance is based on the status of persons as employees, it is understandable that the same problem has been presented repeatedly to referees and the Appeal Board. These cases were momentous to the litigants involved. Only employees working for subject employers can qualify for benefits, and, correspondingly, employers are required to pay taxes on the earnings of only those who are their employees. At the inception of the administration of the Unemployment Insurance Law, the claims for benefits of thousands of claimants were challenged by employers on the ground that they were not employees but independent contractors. One of such cases was *Matter of Morton.*[94a] There the Board decided that the claimant and hundreds of other persons similarly situated (corsetieres) were employees entitled to benefits. The court of appeals said:

> The question to be reviewed by us is not whether claimant was an employee of respondent as a matter of fact, but whether upon the basis of the record before us we must decide as a matter of law that claimant was not an employee. Neither the duty nor the power to weigh the evidence rests with the courts, for that function, by virtue of the statute, has been imposed upon the administrative authority acting in a quasi-judicial capacity. (Labor Law, § 534.) [now Section 623] In referring to the procedure under a parallel statute, it has been said that 'where from the evidence either of two conflicting inferences may be drawn, the duty of weighing the evidence and making the choice rests solely upon the board.'

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[94] Matter of Kelleher, 283 N.Y. 664, 28 N.E.2d 397, *reversing* 258 App. Div. 1017, 16 N.Y.S.2d 865 (1940).

[94a] 284 N.Y. 167, 30 N.E.2d 369, *reversing* 259 App. Div. 771, 18 N.Y.S.2d 375 (1940).

> (*Matter of Stork Restaurant, Inc. v. Boland,* 282 N.Y. 256, 267.)[95]

The court of appeals followed its decision in *Matter of Morton* in another important case, *Matter of Electrolux Corporation,*[96] and reiterated that the Appeal Board's finding of fact that the salesmen involved were employees was final. Similar rulings were made by the courts on the same questions concerning employees in *Matter of Apfel*[97] (life insurance agents); *Matter of Dunne*[98] (securities salesman); *Matter of J. A. Sexauer Mfg. Co., Inc.*[99] (commission salesmen); *Matter of Ford*[100] (photographic service salesmen); *Matter of Clinton Builders Supply Corp.*[101] (roofing service solicitors); *Matter of Inter City Associates Inc.*[102] (real estate salesmen) and *Matter of Arkay Junior Frocks, Inc.*[103] (dress salesmen), in all of which cases the Board's decisions finding as a fact that the persons involved were employees were sustained. Conversely, the Board's finding as a fact that certain officers of a benevolent society were not its employees was upheld by the court of appeals.[104]

In *Matter of Carroll,*[105] the court of appeals held that the Appeal Board's finding, in ruling upon the employer's claim to exemption as an educational organization, that the relationship and business transactions between a private school and an affiliated realty company provided for and effected a syphoning off of the profits of the school through the realty company for the benefit of the latter's stockholders was a question of fact, and since there was substantial evidence to sustain the Board's findings, the appellate division was without power to reverse the Board.

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[95] *Id.* at 169, 30 N.E.2d at 370.

[96] 288 N.Y. 440, 43 N.E.2d 480 (1942), *reversing* 262 App. Div. 642, 30 N.Y.S.2d 972 (1941).

[97] 293 N.Y. 869, 59 N.E.2d 451 (1944), *affirming* 265 App. Div. 899, 37 N.Y.S.2d 867 (1942).

[98] 264 App. Div. 971, 37 N.Y.S.2d 100 (1942).

[99] 274 App. Div. 958, 83 N.Y.S.2d 796 (1948).

[100] 282 App. Div. 996, 125 N.Y.S.2d 477 (1953).

[101] 283 App. Div. 830, 128 N.Y.S.2d 621 (1954).

[102] 284 App. Div. 673, 134 N.Y.S.2d 427 (1954).

[103] 4 App. Div.2d 731, 163 N.Y.S.2d 533 (1957).

[104] Matter of Mutual Benevolent Society of 1865, Inc., 293 N.Y. 901, 60 N.E.2d 31, *reversing* 268 App. Div. 804, 48 N.Y.S.2d 474 (1944).

[105] 288 N.Y. 447, 43 N.E.2d 484, *reversing* 263 App Div. 204, 32 N.Y.S.2d 692 (1942).

As distinguished from the foregoing cases, many of the cases decided by the Appeal Board involve simple questions of fact, and the courts have left undisturbed the Board's findings of fact where there was substantial evidence to support them. Examples of such factual situations are found in cases involving whether or not a claimant is eligible for benefits on demonstrating his availability for employment; that is, that he was ready, willing and able to work;[106] whether or not a claimant continued to be eligible for benefits upon compliance with requirements to report to the unemployment insurance offices;[107] whether or not a claimant should be disqualified from receiving benefits on the ground that without good cause he refused employment for which he was fitted by training and experience;[108] whether or not a claimant should be disqualified from receiving benefits on the ground that he voluntarily left his employment without good cause;[109] whether or not a claimant should forfeit his benefits on the ground that he wilfully made false statements to obtain benefits;[110] whether or not claimants lost their employment involuntarily or because of an industrial controversy in the establishment in which they were employed;[111] whether or not a union regulation limiting the period of temporary employment on board ship was reasonable;[112] whether or not an employer's application to cease to be subject to the law was sufficient;[113] whether or not claimant had sufficient weeks of employment in her base period to qualify for benefits;[114] whether or not an employer was exempt from taxation on the ground that it was a non-profit organization[115] and whether or not an employer had transferred all or substantially all of its assets of business to qualify for a change in its tax rate.[116]

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[106] Matter of Daly, 271 App. Div. 1036, 68 N.Y.S.2d 210 (1947); Matter of Smolofsky, 281 App. Div. 937, 119 N.Y.S.2d 643 (1953).

[107] Matter of Volet, 259 App. Div. 948, 19 N.Y.S.2d 977 (1940); Matter of Haller, 281 App. Div. 737, 117 N.Y.S.2d 736 (1952).

[108] Matter of Hirschberg, 273 App. Div. 936, 77 N.Y.S.2d 915 (1948); Matter of d'Nikinov, 300 N.Y. 618, 90 N.E.2d 484 (1949), *affirming* 275 App. Div. 473, 90 N.Y.S.2d 177 (1949); Matter of Walsh, 281 App. Div. 725, 117 N.Y.S.2d 761 (1952); Matter of Spack, 305 N.Y. 753, 113 N.E.2d 150, *reversing* 280 App. Div. 908, 115 N.Y.S.2d 531 (1952); Matter of Var, 1 App. Div.2d 865, 149 N.Y.S.2d 120 (1956); Matter of Lipschitz, 7 App. Div.2d 777, 180 N.Y.S.2d 63 (1958).

[109] Matter of Selle, 286 App. Div. 1058, 144 N.Y.S.2d 798 (1955).

[110] Matter of Galitizer, 2 App. Div.2d 923, 156 N.Y.S.2d 481 (1956); Matter of Pokutycki, 281 App. Div. 724, 117 N.Y.S.2d 745 (1952); Matter of McLean, 4 App. Div.2d 917, 166 N.Y.S.2d 844 (1957).

c) *Stare Decisis Not Binding*

Whereas the courts are bound by stare decisis the Appeal Board is not. In *Matter of Dresher,*[116a] the court said:

> The board has, of course, the utmost freedom in which way disputed facts are to be decided and need not necessarily be consistent; nor do we have the power to impose consistency. The board probably also has somewhat greater freedom than a common-law court might have in its views on law and legal policy; but we are bound by *stare decisis* where decision involves a question of law and when a legal principle stems from the cases that have been decided we are under a need to follow it. The risk of imposition of some measure of legal consistency by the court upon administrative agencies is part of the tariff that must be paid for whatever advantage can be claimed for review by a law court of the work of an administrator.[117]

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[111] Matter of Burger, 303 N.Y. 654, 101 N.E.2d 763 (1951), *affirming* 277 App. Div. 234, 98 N.Y.S.2d 932 (1950).

[112] Matter of Fiol, 309 N.Y. 661, 128 N.E.2d 317 (1955), *affirming* 284 App. Div. 519, 132 N.Y.S.2d 533 (1954).

[113] Matter of Grand View Apartments, Inc., 285 App. Div. 170, 136 N.Y.S.2d 300 (1954).

[114] Matter of Waterman, 285 App. Div. 1106, 139 N.Y.S.2d 529 (1955).

[115] Matter of Scheffler, 284 App. Div. 1090, 136 N.Y.S.2d 551 (1954).

[116] Matter of Thomas S. Lee Enterprises, Inc., 280 App. Div. 676, 117 N.Y.S.2d 257 (1952).

[116a] 286 App. Div. 591, 146 N.Y.S.2d 428 (1955).

[117] *Id.* at 594, 146 N.Y.S.2d at 429.

It is understandable that in resolving disputed questions of fact, there may appear to be inconsistencies in Appeal Board decisions. So far as this criticism is valid, it is defended, in part at least, upon the ground that administrative adjudication must be simple, flexible and adaptable to a variety of problems.[118] It is sometimes said to be equitable in nature.[119] It is held within a minimum of what has been called "the rudimentary requirements of fair play."[120] The court said this with regard to the charge that there was inconsistency in certain Appeal Board decisions. In *Matter of Gerdano,*[120a] the court said:

> Decisions of the board in other cases, involving this issue and apparently inconsistent, are cited. We need not be concerned with such inconsistencies, but we are concerned with our power to interfere with the administration of the statute in an area of factual dispute.[121]

d) *Exclusive Procedure*

Section 626 of the law provides that the procedure under which hearings on determinations are heard by a referee, with appeal from his decisions first to the Appeal Board and then to the courts, shall be the sole and exclusive procedure, notwithstanding any other provision of law. The appellate division ruled on the effect of this provision in *Matter of Siegel, as Trustee, etc.*[122] and held that the Unemployment Insurance Law provides the sole remedy for an employer's claim for refund of taxes paid, despite a federal order in a bankruptcy proceeding.

e) *Fair Hearing*

That this arrangement satisfies due process was pronounced by the court in *Matter of Bernard,*[123] where it said:

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[118] Ford Motor Co. v. Labor Board, 305 U.S. 364, 369 (1939).

[119] Helvering v. Lazarus & Co., 308 U. S. 252, 255 (1939); Rochester Telephone Corp. v. U.S., 307 U.S. 125, 142 (1939).

[120] Morgan v. U.S., 304 U.S. 1, 14, 15, 22 (1938).

[120a] 2 App.Div.2d 88, 153 N.Y.S.2d 924 (1956).

[121] *Id.* at 90, 153 N.Y.S.2d at 926.

[122] 262 App. Div. 789, 27 N.Y.S.2d 383 (1941).

[123] 285 App. Div. 921, 137 N.Y.S.2d 369 (1955).

> Appeal from a decision of the Unemployment Insurance Appeal Board which reversed the decision of a referee and reinstated the initial determination of the Industrial Commissioner disqualifying claimant from benefits on the ground he refused an offer of employment without good cause. This appeal presents but two issues: (1) whether, as a matter of law, claimant was entitled to be warned at the time of an interview that a refusal to accept a job offered to him might affect his rights to benefits; and (2) whether such a notice of job forfeiture was given to claimant at time of the interview as a matter of law. We find no issue raised as to the validity of the determination that appellant refused an offer of employment without good cause. We find no requirement in the statute that a claimant must be warned that his refusal to accept a job offer might affect his rights to unemployment insurance benefits. Moreover it appears in this case that claimant had a fair and complete hearing after the initial determination. After he had been served with the determination of disqualification made by the Industrial Commissioner he requested a hearing before an Unemployment Insurance Referee. He was given a hearing and was sworn as a witness, with the opportunity to produce any other witnesses he might desire. The Referee rendered his decision overruling the initial determination of the commissioner and the latter appealed to the board. The board decided the case on the basis of the record and the evidence submitted before the Referee. It thus appears that all the requirements of due process were met.[123a]

f) *Review of Administrative Discretion*

The Industrial Commissioner of the state is the administrator of the unemployment insurance system working through the medium of the Division of Employment. In its daily work, the administrative staff must make judicious decisions and exercise its discretion as to whether or not a claimant is entitled to benefits. The law specifically gives discretion to the administrators in various instances. For example, the forfeitures which may be imposed for the wilful making of a false statement or representation to obtain benefits range in extent from five to twenty weeks of benefits. As legislatively expressed, the administrator was given discretion to impose any forfeiture within the compass of five to twenty weeks. In *Matter of Horvat,*[124] the claimant made a false statement in applying for benefits by asserting that she was not pregnant when she was. The administrators, exercising their discretion, imposed a forfeiture of twenty weeks of benefits for this offense. The referee sustained this penalty on the facts presented. The Appeal Board modified the referee's decision by reducing the number of forfeit weeks from twenty to five on the ground that the misrepresentation as to pregnancy was a single offense and that the lesser penalty was appropriate to the facts. The Industrial Commissioner appealed to the appellate division, third department, and then to the court of appeals, contending that the Board was without power to interfere with the discretion exercised by the Commissioner in the absence of a finding that his action was arbitrary or capricious or that the discretion was abused. The appellate division rejected this contention and said:

[123a] *Ibid.*

> The commissioner contends that the board was without authority to reduce the penalty.
>
> Although the Industrial Commissioner has authority to make initial determination, including the right to fix penalties, his discretion in such matters is not absolute, but is subject to a review by a referee and by the Unemployment Insurance Appeal Board, which is specifically given the authority to affirm, reverse or modify (Unemployment Insurance Law, §621, subd.3). There is no limitation on this right which would prevent the board from modifying a penalty, even in the absence of a finding that the initial determination of the commissioner was arbitrary or capricious.[125]

The court of appeals affirmed by a vote of 5 to 2.[126] The dissenting opinion agreed with the foregoing citation from the appellate division decision and elaborated further:

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[124] 275 App. Div. 442, 90 N.Y.S.2d 505 (1949).

[125] *Id.* at 443, 90 N.Y.S.2d at 506.

[126] 300 N.Y. 704, 91 N.E.2d 726 (1950).

> We agree with the opinion of the Appellate Division in the quotation just made. The statutory scheme of article 18 of the Labor Law contemplates that the Industrial Commissioner acting through his insurance managers scattered throughout the State, shall make 'initial determinations' after finding the facts and exercising permissible discretion. Then, on appeal to the referee and later to the appeal board, the statute contemplates a complete review of all disputed questions of fact, of discretion, and of law. We find no limitation, either expressly or by implication, upon the power of the referee and the appeal board to review the initial determinations of those acting for the commissioner. We see no reason for reading such a limitation into the statute. On the contrary, we think there is sound basis for holding that there should be plenary power to review facts and discretion by the referee and the appeal board within the administrative agency, and we think that is what the Legislature intended.[127]

The dissenting judges were in favor of remitting the matter to the Appeal Board only because they did not think the Board's decision sufficiently explicit as to its reasons for modifying the referee's decision.

g) *Administrative Construction by Adjudicator Controlling*

The status of the Appeal Board in the scheme of administrative law is defined in *Matter of Berson,*[128] where the appellate division said:

> The Industrial Commissioner argues that his view should be regarded as the administrative construction. He argues that his construction is entitled to the weight to be given to the interpretation of statutory terms by 'the agency administering the statute', citing *Matter of Mounting & Finishing Co. v. McGoldrick* (296 N.Y. 104, 108). But under the peculiar setup in the administration of the Unemployment Insurance Law, we must regard the interpretation adopted by the Unemployment Insurance Appeal Board, rather than the view of the Industrial Commissioner as the prevailing administrative interpretation. The statute vests in the Unemployment Insurance

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[127] *Id.* at 709, 91 N.E.2d at 728.

[128] 283 App. Div. 190, 126 N.Y.S.2d 579 (1953).

> Appeal Board the final power of decision subject only to judicial review. Section 623 of the Labor Law provides: 'A decision of a referee, if not appealed from shall be final on all questions of fact and law. A decision of the appeal board shall be final on all questions of fact and, unless appealed from, shall be final on all questions of law.'
>
> If the doctrine of the *Mounting & Finishing Co.* case is to be applied to the terms used in the Unemployment Insurance Law, it is the interpretation by the Appeal Board which is to be accorded special weight by the courts.[129]

Cooperation by the Administrator and Adjudicator

The period of growth of the adjudicative process in unemployment insurance has witnessed the development of mutual respect and understanding between the administrator and the adjudicator. Each fully realizes that there is no clash of spheres of jurisdiction or authority between them. Each complements and strengthens the other. Each has his separate role to play in the orderly functioning of government.

The administrator fulfills his duty when, according to his interpretation of the law, as implemented by procedures, rules and regulations, he exercises his judgment to withhold benefits from a claimant or to assess an employer with contributions. When the dissatisfied claimant or employer exercises his statutory right to have that judgment reviewed by an impartial adjudicator, the administrator does not discourage that challenge but aids the appellant in instructing him how to obtain a hearing.

Before the referee, the administrator's side of the dispute is presented dispassionately, and his entire file is made available to the claimant, the employer or a representative. On appeal to the Board, the facts are pointed up and the law argued by the administrator objectively and again with full disclosure of all the evidence. Often, the determination against the claimant or the employer is withdrawn at the referee's hearing or even on appeal because of the discovery of further facts favorable to the appellant.

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[129] *Id.* at 196, 126 N.Y.S.2d at 584.

The administrator continuously makes use of the decisions of referees and the Appeal Board to train and instruct his staff throughout the state on how to make determinations or withhold them in similar cases. Frequently, new procedures, rules and regulations are promulgated as a result of referee or Appeal Board rulings and reasoning.

Correspondingly, the decisions of referees and the Appeal Board reflect the respect for and the appreciation of the role of the administrator. Even when his judgment is overruled, no adverse comments on his actions ever appear in the decision. Repeatedly, the adjudicators affirmatively support the administrators and declare in their decisions that the administrator is entitled to full disclosures of facts by claimants and employers so that informed judgment can be made. The administrator is invited frequently by the adjudicator to appear specially in a referee case or to participate in an appeal because it is to the interest of the administrator to do so. Just as there is no conflict between the judicial branch and the executive branch of government, so is there no cleavage between administrator and adjudicator in unemployment insurance.

Conclusion

The adjudicative process in the field of unemployment insurance, founded upon a simple legislative mandate to provide hearings to dissatified claimants or employers, and bolstered by the federal provision to provide an opportunity for a fair hearing before an impartial tribunal for all individuals whose claims for benefits are denied, has been built painstakingly into a comprehensive system of administrative justice, respecting and adhering to American constitutional standards of due process and fair play.

Twenty-one years of operation is a short span in government life. In this comparatively brief period, we have witnessed the emergence and devolopment of an adjudicative process where none existed before. Our present process has been hammered out on the anvil of experience and experiment. It is not and cannot remain static. It will grow with new methods and expedients, with added strength and innovations so that it will reflect the American ideals of living administrative justice. Unemployment insurance adjudication has made and will continue to make creditable contributions to "the outstanding legal development of the twentieth century."

Legal and Administrative Problems of the Board of Regents and the New York State Education Department

Charles A. Brind *

In order to understand the legal implications involved in the administration of the education system of this State, it is necessary first to go back and examine its early history, since the provisions of the statute today and the functioning of the educational processes may only be understood with this perspective.

I suppose the education system started on the day the Dutch settlers landed in New York. However, the education system, as we know it, started in 1784 when the State Legislature[1] established the corporation known as The University of the State of New York, gave it certain powers and specified that its board of trustees would be the board of governors of Kings College. However, it soon became apparent that the tie-in of the University to one institution was not accomplishing what had been planned for a state system, and, therefore, the legislature in 1787[2] repealed the earlier act, re-established Kings College as Columbia University, gave it its own board of trustees and re-established The University of the State of New York as a corporate entity. Its general powers, through its board of trustees, known as the Board of Regents, was "to visit and inspect all the colleges and academies to be established in this State."[3] Like any university, it had the general powers of corporations, to carry on instruction and to grant

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[1] N.Y. Sess. Laws 1784, ch. 51.

[2] N.Y. Sess. Laws 1787, ch. 82.

[3] N.Y. Sess. Laws 1787, ch. 82.

degrees, and particularly to incorporate any institutions it thought worthy of recognition as new colleges and academies. Union College, Schenectady, was the first college established by the Board of Regents pursuant to the powers vested in it by the legislature. To insure that the University from then on would be a completely independent body, the statute provided that no member of the Board of Regents might also serve as a trustee of any of the institutions in the University.

There has been some misunderstanding as to the terminology of "The University of the State of New York." The type of a university thus created involved more of a European conception of higher education than has grown up in this country. The statute defines The University of the State of New York as those institutions which have been incorporated by it or are subject to its visitation. In other words, all of the institutions of the State combined make up The University of the State of New York. Embracing this concept, it is quite evident that The University of the State of New York is the largest university in the world, because its component parts are Columbia, Cornell, Union, Albany Law School, New York University, etc., their campuses, faculties and student bodies. Because higher education at the time this act was passed included the academies or instruction on the high school level, all the private and public high schools of the State are also part of The University of the State of New York.

The University did not, however, have jurisdiction over instruction on what is now called the elementary level, and the legislature, therefore, concluded that there should be some organization to take care of this situation. Consequently, in 1812 a statute was passed[4] providing for the establishment of school districts. This had become essential in order that there be some general system for the administration of schools upon the elementary level and for the distribution of the small amount of state aid that was available. The head of the system was to be a "Superintendent of Public Instruction." Three commissioners were to be selected from each town to divide the entire State into school districts and such districts were to be under his jurisdiction. The legislature, recognizing at that time that school districts could not in any sense remain static, gave the school commissioners who had already established the districts the power to alter them, to re-establish school district lines, to consolidate districts and to do whatever was necessary to maintain a proper district organization. In 1911 the title of school commissioner was changed to "District Superintendent," but the old powers were continued.[5] The districts were called "common" school districts which, in the parlance of the day, was synonymous with "public."

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[4] N.Y. Sess. Laws 1812, ch. 242.

However, education was in no sense free and it was not until 1849 that the legislature embarked upon a program aiming toward making the schools free. By that time there was a considerable demand that there be free high school instruction. So far high school instruction was being given by the academies, which as indicated were under the jurisdiction of the Board of Regents. In the original Union Free School Act,[6] boards of education were granted the power to establish academic departments, and this is the power which separates union free school districts from common school districts which do not have such power. So here we had the situation where the Board of Regents had jurisdiction over the academies or private school education, and the Superintendent of Public Instruction had jurisdiction over public school education. It was inevitable, therefore, that a great many conflicts would arise in respect to the establishment of curriculum, licensure of teachers and the many other problems common to both public and private institutions. The Superintendent of Public Instruction concluded that the academies were not properly preparing teachers who would be qualified to teach in the public school system. This cleavage became so controversial that finally, through the heroic efforts of Andrew S. Draper, the legislature in 1904[7] passed an act consolidating the Board of Regents and the Department of Public Instruction. This was a compromise measure, and, in order to get it passed, for practical purposes, the powers of both institutions were continued with the Board of Regents as the head of both, but with the Superintendent of Public Instruction, whose title was then changed to Commissioner of Education, as the executive officer of the Board. Andrew S. Draper became the first Commissioner of Education.

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[5] N.Y. Sess. Laws 1910, ch. 607.

[6] N.Y. Sess. Laws 1853, ch. 433.

Since then, the amalgamation has been simplified and many areas of misunderstanding cleared up by subsequent acts of the legislature. Furthermore, the State Constitution has been amended (1925) so as to make it perfectly clear that there exists a State system of education, that the Board of Regents is the head of that system, and that the Commissioner of Education is the chief executive officer.

This is a very brief resume of the historical background, but, as indicated earlier, the administrative basis of this system is inherent therein.

After the school districts were established in 1812, a great many disputes arose in the various school districts concerning the boundary lines, school meetings and various administrative questions. Letters were written to the Superintendent of Public Instruction asking him to solve them, but his opinions carried no official weight. Where a real controversy could not be settled, the courts were importuned to do so. The Superintendent of Public Instruction asked the legislature that some status be given to the solutions which he had been making. He suggested to the legislature that they confer upon him quasi-judicial authority to settle education difficulties, and he also asked the legislature to arrange matters so that his determinations would be final in order that the educational processes continue and children not be deprived of years of instruction awaiting the long judicial processes in the courts. Said he,

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[7] N.Y. Sess. Laws 1904, ch. 40.

> Although the superintendent of common schools is frequently consulted on questions arising in towns and counties, and is required to give written legal opinions thereon, and to enter into a long correspondence with the officers entrusted, in towns and school districts, with the execution of the act, and with others, on the subject of their complaints, still there exists no legal authority to enforce any of his opinions, nor to put an end, to the vexatious controversies submitted to his decision. The school act is already too complicated in many of its provisions, to increase the difficulty, by driving the parties into an expensive litigation, to settle probably a point of no great importance in itself, but which derives all its interest from the passions and prejudices of the parties concerned. It were better, perhaps, in such cases, to have a speedy decision, at the risk of being wrong, than to injure, if not derange, the whole system, by a long, oppressive, and procrastinated legal controversy. It is proposed, therefore, to provide a remedy, by giving the right of appeal to the superintendent, and that his decision should be final in the specified cases mentioned in the section submitted for that purpose.[8]

So, the legislature in 1822, at his behest, passed such a statute.[9] In 1904, when the powers of the Superintendent of Public Instruction and those of the Board of Regents were consolidated,[10] the legislature specifically continued the judicial power of the Commissioner of Education and made it independent of the Board of Regents.

The statutory provision, viz., present section 310[11] of the Education Law, as it has come down through the years is

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[8] Annual Report of the Superintendent of Common Schools, Feb. 26, 1822, in Assembly Journal, Feb. 28, 1822, at p. 621.

[9] N.Y. Sess. Laws 1822, ch. 256.

[10] *Supra* note 7.

[11] For those who are interested in tracing the history of section 310 of the N.Y. EDUCATION LAW, the following legislative chapters may be noted:

In 1822, the legislature amended the act for the support of the common schools by enacting the original forerunner of the present section 310. This new enactment, for the first time, provided for appeals to the Superintendent of Public Instruction. This power has continued to date, and is today found in section 310 of the N.Y. EDUCATION LAW. See N.Y. Sess. Laws 1822, ch. 256, § 7; N.Y. REV. STAT. §§ 110, 111 (1829); N.Y. Sess. Laws 1830, ch. 320, § 7; N.Y. REV. STAT. § 124 (1836); N.Y. Sess. Laws probably the most important one in the whole volume as far as the "State" system of education is concerned.

With it we have a state system of education; without it none exists. It is the one section that all of the educational bodies have united to defend over the years. Innumerable attempts to repeal it have been presented to the legislature, but in every instance representatives of every educational body have sprung to its defense, and the legislature, while vigorously importuned by persons who have lost their cases before the Commissioner of Education, has been adamant in not amending or changing the statute.

Section 310 reads as follows:

> § 310. Appeals or petitions to commissioner of education and other proceedings.
>
> Any person conceiving himself aggrieved may appeal or petition to the commissioner of education who is hereby authorized and required to examine and decide the same; and the commissioner of education may also institute such proceedings as are authorized under this article and his decision in such appeals, petitions or proceedings shall be final and conclusive, and not subject to question or review in any place or court whatever. Such appeal or petition may be made in consequence of any action:
>
> 1. By any school district meeting.

1847, ch. 480, § 132; N.Y. Sess. Laws 1864, ch. 555, § 1; Consolidated School Law [N.Y. Sess. Laws 1894, ch. 556] title 14, § 1; N.Y. EDUCATION LAW § 360 (1909); N.Y. EDUCATION LAW § 880 (1910); N.Y. Sess. Laws 1918, ch. 253, § 6.

The original enactment in 1822 provided that the decision of the Superintendent of Public Instruction "shall be final." In 1864, when the school code was revised, and consolidated, for the purpose of clarifying the intent of the legislature and making the same "clearly apparent" —to borrow the language appearing in the Annual Report of the Superintendent of Schools of that year—the words "and conclusive, and not subject to question or review in any place or court whatever" were added.

The legislative intent of this statute is consequently clear. Originally, the statute said that the decision of the Commissioner (the Superintendent of Common Schools) should be final. The legislature later added that it should be "final and not subject to review in any court whatever."

> 2. By any district superintendent and other officers, in forming or altering, or refusing to form or alter, any school district, or in refusing to apportion any school moneys to any such district or part of a district.
>
> 3. By a county treasurer or other distributing agent in refusing to pay any such moneys to any such district.
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> 4. By the trustees of any district in paying or refusing to pay any teacher, or in refusing to admit any scholar gratuitously into any school or on any other matter upon which they may or do officially act.
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> 5. By any trustees of any school library concerning such library, or the books therein or the use of such books.
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> 6. By any district meeting in relation to the library or any other matter pertaining to the affairs of the district.
>
> 7. By any other official act or decision of any officer, school authorities, or meetings concerning any other matter under this chapter, or any other act pertaining to common schools.

This provision has been held to be constitutional by the courts of this State and by the United States Supreme Court.[12] In *Board of Education v. Tuttle,*[13] the Court held:

> Furthermore, it is claimed by the respondent that the provision of the Education Law above referred to conferring judicial powers upon the Commissioner of Education is unconstitutional. *This question has been passed upon by the Court of Appeals* in the case of *Bullock v. Cooley* (225 N. Y. 566), where it is held that the provision in question is constitutional.[14]

The question of constitutionality is, therefore, settled. The legislature in making the decisions of the Commissioner of Education final did so knowing full well that people differ, that courts differ and that there would be decisions of the Commissioner of Education with which other persons and other courts would certainly differ. This would be true upon the law as well as upon the merits. The legislature, recognizing this, and recognizing at the same time that the Commissioner of Education was not clairvoyant to the extent that his determination would always be perfect, did not enact the section in order to protect an imperfect determination. The object of the statute was to entrust to the Commissioner of Education a final determination which could be cheaply sought and quickly made, in order that the educational system could continue to function without serious interruption and without the long delays which are naturally inherent in a case which commences in the supreme court, progresses to the appellate division and court of appeals, and perhaps to the United States Supreme Court. In dealing with transportation of school children, for instance, it is important that the issue be settled at once. Any order to provide transportation is effective only for the school year involved—a period of ten months. To process an Article 78 proceeding through the State courts will normally take at least the better part of this ten-month period—so that even an eventual affirmance of the Commissioner's order will become an empty gesture—the pupil involved will not have had the transportation to which he is declared entitled and no human power can make restoration. In dealing with school sites, problems of the teaching force and problems relating to pupil relationship, it is important that they be settled speedily and that school be continued, to mention but a few illustrations.

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[12] People *ex rel.* Underhill v. Skinner, 74 App. Div. 58, 77 N.Y. Supp. 36 (1902); Bullock v. Cooley, 225 N.Y. 566, 122 N.E. 630 (1919).

[13] 125 Misc. 230, 211 N.Y. Supp. 413 (1925).

[14] *Id.* at 234, 211 N.Y. Supp. at 417. See also Matter of Kabott, 246 App. Div. 886, 284 N.Y.S. 2d 845 (1936), *appeal dismissed* 271 N.Y. 629, 3 N.E.2d 456 (1936), *reargument denied* 272 N.Y. 508, 4 N.E.2d 421 (1936), *cert. denied* 300 U.S. 657 (1936), *rehearing denied* 300 U.S. 687 (1937).

It makes little difference to the State who is elected to be a member of the board of education. It makes little difference to the State where a school is to be located, but it is important that school continue to be maintained. It makes little difference to the State where the boundary line of a school district runs, but it is important that the child who is affected have a place where he will be admitted to school. No one has a vested interest in a boundary line. Furthermore, it was important to the State that a tribunal be immediately available to settle hundreds of the minor educational problems, such as, assignment to classes, disciplinary issues, use of school buildings and other similar problems, expeditiously and at a low cost to the aggrieved party. The simple expedient of appealing to the Commissioner of Education with finality as the end result solved this problem.

These principles are also those enunciated by the courts themselves, which have pointed out such principles with approval on numerous occasions [15] in decisions relating to this section. As a matter of fact, for 125 years, while it has been true that an alternate remedy of court review was available, the courts have been chary of taking jurisdiction of strictly educational problems. It will be found that in many instances the courts refused to do so.[16] Such matters were intended to be entrusted to the Commissioner of Education for his quick determination, and his jurisdiction should be sought.

For most of the years during which this statute has been in effect, there were no similar provisions in other areas, and the quasi-judicial position of the Commissioner of Education was recognized but not emulated. However, within the last quarter of a century there has sprung up a system of administrative determinations which has given rise to a new body of law, known as administrative law. Most of this administration is by the fiat of the officer in charge. It has been abused in many instances, and the courts have felt compelled to interfere. It has not been administered in the same manner that determinations of the Commissioner of Education have been made, in which rules of practice adopted by the Commissioner of Education have been in effect and in which the litigant has the same privilege of preparing his papers and presenting his case as he has in the courts. Most of the Commissioner's reviews are those of the actions of lower bodies such as boards of education. The litigants have had the opportunity of presenting their cases not only by filing papers, but by presenting oral argument. Therefore, the courts have indicated that, notwithstanding the express finality provisions contained in section 310 of the Education Law, they would review the decisions on a purely limited basis, viz., to see if they were ''arbitrary.'' However, they said that arbitrary misconduct had to reach a stage where no reasonable man could have come to the conclusion to which the Commissioner came. The courts have pointed out, specifically in *Levitch v. Board of Education,*[17] that the mere fact that the Commissioner of Education had to construe a statute did not deprive his decision of finality, and that his determination was still final even in a case where, if they were deciding the case de novo, they might not have given the statute the same construction as the Commissioner of Education gave to it.

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[15] See, *e.g.,* Bullock v. Cooley, 225 N.Y. 566, 122 N.E. 630 (1919).

[16] See, *e.g.,* Bullock v. Cooley, *supra* note 15; People *ex rel.* Board of Education v. Finley, 211 N.Y. 51, 105 N.E. 109 (1914).

The courts have held for nearly 135 years that the language of section 310 precluded a review by the courts of the decisions of the Commissioner of Education both *on questions of fact* and *on questions of law.*[18] It is a rare case indeed in which a legal question, or a question such as the sufficiency of the record, is not involved in a decision of the Commissioner of Education. Consequently, if the Commissioner's decisions in respect to such matters were reviewable per se, the finality provisions of section 310 would be repealed, because every single case which the Commissioner has decided would become immediately reviewable to determine whether he has ''made a mistake'' in his construction of the statute or the legal problems involved. Of all the cases reviewed by the courts there has been but one case where the courts attached ''arbitrariness'' to a decision of the Commissioner.[19] Even in that case, the court of appeals said it was arbitrary in a ''legal sense.'' This decision gave rise to a rash of cases being immediately taken to the courts.

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[17] 243 N.Y. 373, 153 N.E. 495 (1926).

[18] Easton v. Calendar, 11 Wend. (N.Y.) 91 (1838).

[19] Ross v. Wilson, 308 N.Y. 605, 127 N.E.2d 697 (1955).

To clear up any misunderstanding, the court of appeals pointed out, in *Board of Education v. Allen*[20] that the "decisions by the Commissioner of Education are final unless purely arbitrary."[21] In the opinion, written by Chief Judge Conway, it was said:

> The term 'arbitrary', standing by itself, would be quite sufficient to make it plain that only a narrow review of the Commissioner's decisions is available in the courts. In the above-cited cases we undertook to emphasize the point by employing the phrase 'purely arbitrary'.[22]

The Commissioner of Education, in administering the judicial power granted him, has adopted rules of practice relating to appeals and other proceedings before the Commissioner, and copies of these rules may be obtained by requesting a copy thereof from my office.

The proceedings before the Commissioner are commenced by the serving of a verified petition upon the school officer or body whose act is sought to be appealed from and filing with the Commissioner of Education the original petition, together with proof of such service. The respondent to the appeal is notified of the filing of such appeal and given ten days in which to file his answer. The service of a reply and rejoinder may be effected only upon receiving permission to do so, and thereafter if the Commissioner desires oral argument an opportunity for such argument is afforded the parties. After the exchange of briefs and other materials, a written decision is rendered.

It should be pointed out that the Commissioner of Education does not take testimony at hearings brought before him pursuant to the provisions of section 310 of the Education Law, evidence being submitted to him in the form of affidavits, exhibits, etc. The necessity for taking testimony in appeals to the Commissioner of Education has recently been considered in *O'Brien v. Commissioner.*[23] It was there held that the taking of testimony in cases before the Commissioner is not a constitutional requirement.

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[20] 6 N.Y.2d 127, 160 N.E.2d 60, 188 N.Y.S.2d 515 (1959) (Burke, J., dissenting).

[21] Ross v. Wilson, 308 N.Y. 605, 608, 127 N.E.2d 697, 698–699 (1955). See Levitch v. Board of Education, 243 N.Y. 373, 153 N.E. 495 (1926).

[22] Board of Education v. Allen, 6 N.Y.2d 127, 136, 160 N.E.2d 60, 64, 188 N.Y.S.2d 515, 520 (1959).

Since 1894, section 310 (and its predecessors) has further assumed a new and deeper significance. Since the enactment, at that time, of present Article XI, Section 1, of the State Constitution, the finality provision must be read as a part of the legislative execution of the constitutional mandate to keep the public schools running without interruption —the mandate expressed in section 1. While the enactment of this constitutional provision did not add anything more than the constitutional formalization of the principles involved in the original finality statute of 1822,[24] it serves to highlight and to strengthen this principle to the effect that the State system of education must rest on the finality of the quasi-judicial decisions of the Commissioner so as to avoid interruptions in educational services due to the delays necessarily inherent in litigation in the courts. The recognition of this principle by the people of the State is expressed both by the addition of the language "and not subject to question or review in any court or place whatever" [25] by the Legislature of 1864, and the enactment, after many years of effort, study and discussion, of the provisions of Article XI, Section 1, of the Constitution.[26]

While I have gone into some detail with respect to the present legal status of section 310, it is important that the finality provisions be viewed as a remedy which has been deliberately selected by the litigant. He is under no obligation (with but one exception) to bring his case to the Commissioner of Education. If he wants a court review, all he has to do is to seek it in the first instance. He knows when he appeals to the Commissioner of Education that if he wins he has a final determination. If he loses, likewise, he is bound by it. It has been his option, and there is no reason why he should have the privilege of both remedies. The person who appeals to the court in the first instance cannot start over again with the Commissioner if he does not like the court's determination.

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[23] 3 App. Div.2d 321, 160 N.Y.S.2d 754 (1957), *motion to have appeal heard granted* 3 N.Y.2d 881, 145 N.E.2d 182, 166 N.Y.S.2d 507 (1957), *appeal dismissed* 4 N.Y.2d 140, 149 N.E.2d 705, 173 N.Y.S.2d 265 (1958), *motion for leave to appeal denied* 6 App. Div. 2d 745, 174 N.Y.S.2d 975 (1958), *motion for leave to appeal denied* 5 N.Y.2d 707, 149 N.E.2d 705, — N.Y.S.2d — (1958), *motion for reargument denied,* May 14, 1959.

[24] *Supra* note 11.

[25] N.Y. Sess. Laws 1864, ch. 555, § 1.

[26] See Bullock v. Cooley, *supra* note 11, at 577, 123 N.E. at 633; also see N.Y. STATE CONSTITUTIONAL CONVENTION COMM., PROBLEMS RELATING TO BILL OF RIGHTS AND GENERAL WELFARE, vol. 6, at 229–237 (1938).

The exception above noted relates only to appeals from school meetings.[27] Here is where officers are elected and appropriations made. For the reasons enumerated heretofore, the legislature insists that school be maintained and has chosen this method of appeal to the Commissioner of Education in order that there be a quick settlement of the litigation of proceedings at school meetings.

There has arisen on occasion certain misunderstandings relative to when the Commissioner of Education is exercising judicial or administrative powers. While these misunderstandings have generally been the result of misapprehension in the minds of laymen, nevertheless their existence should be resolved. The Commissioner of Education has a great many acts which he performs which have nothing to do with his judicial powers. When he lays out and defines the boundaries of school districts, when he appoints or dismisses employees, when he approves the consolidation of school districts, when he approves the plans and specifications for school buildings, when he gives written advice on educational matters or when, in his talks, he covers similar areas, he is acting within his administrative functions. Such acts have nothing to do with the provisions of section 310 of the Education Law, and they are in no sense final. They are subject to review in court under the same circumstances as would any matter dealing with similar procedures, in any state department. Of course, upon such a review, the courts have limited themselves to the inquiry as to whether or not the determination was reasonable. One of the oldest principles of administrative law is that the courts will not substitute their judgment for that of an administrative agency which, under the statute, must use discretion in making determinations in the first instance. However, the discretion exercised must be reasonable. *Administrative* determinations of the Commissioner have been reviewed by the courts in a great many cases. The following are cited merely as examples of cases where section 310 of the Educaton Law and finality are not involved: an order laying out a new central school district;[28] court review of refusal of Commissioner to lay out a central school district;[29] an order laying out an enlarged city school district (Newburgh);[30] an order of annexation to a central school district;[31] court review of refusal of Commissioner to consent to a consolidation;[32] and court review of adoption of certain Regulations by the Commissioner;[33]

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[27] N.Y. EDUCATION LAW § 2037.

Another of the extensive legal duties of the Department is to police each one of the eighteen professions assigned to the Department. Licenses are issued by the Department based upon minimum statutory conditions, supplemented by Regents Rules. This, it might be noted, is a power which came down through the Board of Regents. The Regents have power to suspend or revoke the licenses for violation of the statutory standards of practice applicable to the profession. The Regents are also empowered to make rules of professional conduct which they have adopted for each profession, and violation of such rules subjects the licensee to disciplinary proceedings. Any person conceiving himself aggrieved because of alleged adverse action of the Department may avail himself of an Article 78 proceeding to review the same. Any person who is convinced that a licensee has violated his trust may send his complaint to the Department. The Department maintains a staff of investigators whose sole duty it is to investigate such complaints. If the complaint warrants action, the Department lays it before the Grievance Committee of the Board of Examiners of the profession, and in proper cases, charges are voted.

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[28] Board of Education of U.F.S. Dist. No. 1, Towns of Bethlehem, Coeymans, New Scotland v. Wilson, 196 Misc. 239, 3 N.Y.S.2d 492 (Sup.Ct. 1949), *aff'd,* 277 App. Div. 809, 96 N.Y.S.2d 822 (1950), *appeal denied* 277 App. Div. 953, 99 N.Y.S.2d 612 (1950), *aff'd,* 303 N.Y. 107, 100 N.E.2d 159 (1951).

[29] U.F.S. Dist. No. 9, Town of North Hempstead v. Wilson, Decision by Bookstein, J., January 26, 1954 (not reported).

[30] Clark v. Allen, 12 Misc. 2d 988, 177 N.Y.S.2d 180 (Sup.Ct. 1958), *unanimously aff'd,* 7 App. Div.2d 144, 181 N.Y.S.2d 84 (1958).

[31] Trustee of School Dist. No. 9, Town of Onondaga v. Commissioner of Education, 199 Misc. 757, 104 N.Y.S.2d 390 (Sup.Ct. 1951).

[32] Peterson v. Allen, 9 Misc.2d 680, 170 N.Y.S.2d 91 (Sup.Ct. 1958).

[33] Jokinen v. Allen, 15 Misc.2d 124, 182 N.Y.S.2d 166 (Hogan, J., December 23, 1958).

Reference has been heretofore made to "Regents Rules." Under the provisions of section 207 of the Education Law, the Regents are empowered to adopt rules, not inconsistent with the statute, which have the force of law. Many sections of the Education Law give the Commissioner of Education, likewise, power to adopt regulations. Hence, we have two sets of rules, those adopted by the Regents called Rules, and those by the Commissioner called Regulations. In general, the Rules of the Regents are general and overall statements of power; the Regulations of the Commissioner contain the detail. The Regulations of the Commissioner are always approved by the Regents, and, of course, supplement but do not conflict with the Regents Rules. Both sets of rules are codified and filed with and published by the Department of State.

These are some of the areas where legal and administrative problems exist in the operation of the State system of education. Space in this article has permitted little detail in some of those mentioned, and, of course, many other areas such as the licensure of motion pictures, approval of bond issues by the Regents, registration and accreditation of schools and colleges here and abroad, could not be touched upon.

Judicial Review of Administrative Determinations in New York State

Ruth Kessler Toch *

When the administrative process, considered in the other articles of this symposium, is at an end and the administrative determination has been rendered, comes the question of what one affected by it may do or can do if he conceives himself aggrieved.

The right to carry the grievance to the courts, and the scope of review the courts deem themselves on the one hand warranted in exercising, and on the other hand duty bound to exercise, are, generally speaking, partially circumscribed by the statutes of a particular jurisdiction, and for the rest developed by its courts. Since a given statutory situation is of directional importance if not controlling, certainly on the right and even on the extent of judicial review of administrative determinations, this article will for the most part be confined to the specific concern of New York lawyers, an examination of the law on both phases of judicial review, as it has unfolded and continues to unfold, in the State of New York.

I.

The Right and Method of Review

The generalization that all administrative determinations are subject to at least some judicial surveillance in this State is justified. Even statutory attempt to deny any review is the exception. And such statutory designs at preclusion do not totally shield the administrative decision from any judicial inspection.[1]

We turn then to the methods of review in this State since this is a necessary background to an understanding of its scope.

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[1] For more on this, see Part I, C, *post.*

A. *The Article 78 Proceeding; other statutory provisions for review.*

The usual application to the judiciary to review a determination of an administrative officer, body or agency is likely in this State to be entitled an application "for an Order under Article 78 of the Civil Practice Act." Article 78 of the Civil Practice Act enacted twenty-three [2] years ago provides a detailed procedure for a "Proceeding Against A Body Or Officer." The "body or officer" against whom such a proceeding may be brought is given a comprehensive definition.[3] The determination which may be reviewed by the proceeding is defined broadly enough to make all final determinations of a body or officer subject to review under Article 78,[4] but as to some determinations, recourse to Article 78 review is denied by specific provision [5] in it. One instance is where appeal from a determination to a court or to some other body or officer is available.[6]

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[2] N.Y. SESS. LAWS 1937, ch. 526.

[3] N.Y. CIV. PRAC. ACT § 1284 (1): "The expression 'body or officer' includes every court, tribunal, board, corporation, officer, or other person, or aggregation of persons, whose action may be affected by the proceeding under this article."

[4] N.Y. CIV. PRAC. ACT § 1284 (2): "The expression 'to review a determination' refers to the relief heretofore available in a certiorari or a mandamus proceeding for the review of any act or refusal to act of a body or officer exercising judicial, quasi-judicial, administrative or corporate functions, which involves an exercise of judgment or discretion."

[5] Relief by Article 78 is not available "except as otherwise expressly prescribed by statute" to review a determination in the following cases (N.Y. CIV. PRAC. ACT § 1285):

> "1. Where it was made in a civil action or special proceeding by a court of record or a judge of a court of record except an order summarily punishing a contempt of court committed in the immediate view and presence of such court or judge.
>
> "2. Where it was made in a criminal matter, except a criminal contempt of court committed in the immediate view and presence of the court and punished summarily.
>
> "3. Where it does not finally determine the rights of the parties with respect to the matter to be reviewed.
>
> "4. Where it can be adequately reviewed by an appeal to a court or to some other body or officer.
>
> "5. Where the body or officer making the determination is expressly authorized by statute to rehear the matter upon the petitioner's application; unless the determination to be reviewed was made upon a rehearing, or a rehearing has been denied, or the time within which the petitioner can procure a rehearing has elapsed."

The Article 78 remedy, not often denied as improper procedurally, is accordingly the common method by which relief is sought in New York from administrative determinations.

That is not to say that other procedure is not provided by specific statutes and in some cases required to be pursued in accordance with such statutes.[7] Frequently, these statutes antedate Article 78.[8] Some such statutes have been brought up to date and of a pattern with Article 78. An instance is Article 13 of the Tax Law, which was revised in 1949[9] to abolish the writ of certiorari, theretofore the procedure under it, and substitute a petition. But the time for review is shorter than under Article 78[10] and other details of procedure differ.[11] Many laws enacted or amended subsequent to 1937 merely provide for review under Article 78.[12]

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[6] N.Y. CIV. PRAC. ACT § 1285 (4). Matter of Ryan, 258 App. Div. 912, 16 N.Y.S.2d 366 (1939); 609 Holding Corp. v. Burke, 281 App. Div. 678, 117 N.Y.S.2d 921 (1952); Law v. Henion, 281 App. Div. 851, 119 N.Y.S.2d 305 (1953); City Title Ins. Co. v. Orgel, 2 App. Div.2d 250, 154 N.Y.S.2d 751 (1956).

[7] It would be a considerable project to attempt to tabulate with accuracy the statutory provisions in this State which explicitly provide for review of administrative determinations pursuant thereto, and will not be essayed here.

[8] *E.g.,* N.Y. TAX LAW § 251; N.Y. ELECTION LAW § 336.

[9] N.Y. Sess. Laws 1949, ch. 551.

[10] *Cf.* N.Y. TAX LAW § 290-a, *with* N.Y. CIV. PRAC. ACT § 1286. As amended in 1948, § 1286 incorporates the shorter period of limitation imposed by the law under which the determination being reviewed was made. See 1948 Legislative Annual at 18 for the reason for this amendment.

[11] For example, as to the Answer. *Cf.* N.Y. TAX LAW § 292, *with* N.Y. CIV. PRAC. ACT § 1291.

[12] For example, the Civil Service Law provision, as to appeals from determinations of the Commission was amended in 1941 to so provide. N.Y. CIVIL SERVICE LAW § 76(1) derived from § 22. Theretofore the law had provided for review by writ of mandamus. So also, N.Y. INSURANCE LAW § 34.

While it has been unequivocally declared that Article 78 did not repeal the procedure for review provided in other statutes,[13] the courts have in some instances found room for resort upon one ground to the procedures of a specific statute, and upon another ground to Article 78, to review determinations of the same agency. A decision of the appellate division, first department, has held that, notwithstanding that procedure was provided for review of a tax assessment in the State Tax Law (referred to *supra*) and the New York City Administrative Code, an Article 78 proceeding may be brought to challenge the jurisdiction over the power to tax what was alleged to be a State agency. That is, jurisdiction over the subject may be challenged by Article 78 and the procedure for review in the Tax Law is not exclusive, nor is a taxpayer limited to it[14] for such purpose.

The same court in a later case[15] held Article 78 to apply to certiorari proceedings to review determinations of the New York City Board of Standards and Appeals insofar as the need for obtaining leave to appeal an intermediate order was concerned. The City Charter and Administrative Code contain provisions for review of the Board's determinations. The court held that "the matter turns" on whether these "controlled exclusively" or whether Article 78 was "also applicable." The conclusion was that "the city statutes, insofar as they have specific provisions, serve to modify any counterpart provisions in article 78."[16]

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[13] See, *e.g.,* certiorari provided by N.Y. TOWN LAW § 267; People *ex rel.* Hudson-Harlem Co. v. Walker, 282 N.Y. 400, 405–6, 26 N.E.2d 952, 954 (1940). And see for a more recent decision citing intervening decisions, Alwalt Realty Corp. v. Boyland, 5 Misc.2d 1061, 160 N.Y.S.2d 504 (Supreme Court, N.Y. County 1957).

[14] State Ins. Fund v. Boyland, 282 App. Div. 516, 125 N.Y.S.2d 169 (1953), *aff'd,* 309 N.Y. 1009, 133 N.E.2d 457 (1956).

[15] North American Holding Corp. v. Murdock, 6 App. Div.2d 596, 180 N.Y.S.2d 436 (1958), *aff'd,* 6 N.Y.2d 902, 160 N.E.2d 926, 190 N.Y.S.2d 708 (1959).

[16] *Id.* at 598–599, 180 N.Y.S.2d at 438–9.

Where the city statutes contained no "procedural directions," [17] Article 78 was deemed to apply.

B. *What is before the Court on an Article 78 Review.*

What can the petitioner, who seeks to overturn an administrative determination against him, bring before the courts in support of his effort in an Article 78 proceeding? Of course, the court should have the record on which the administrative body or officer acted. The Civil Practice Act provides that this must be supplied by the body or officer whose determination is up for review.[18] What else is to be before the court depends much on the kind of proceeding had before the administrative body or officer. Administrative determinations are made (a) in some instances without a hearing and (b) in other cases after a hearing.[19] When the petition comes to a special term of the supreme court in the former case, there is a record already made, and if the petitioner raises questions as to the competency and sufficiency of the proof,[20] the matter will be transferred [21] to the appellate division to decide on that record.[22]

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[17] *Ibid,* quoting from Smith v. Board of Standards and Appeals, 2 App. Div.2d 67, 69, 153 N.Y.S.2d 131, 134 (1956).

[18] N.Y. CIV. PRAC. ACT § 1291.

[19] Under the old procedure, the review of (a) would have been by writ of mandamus and (b) by writ of certiorari. See text accompanying note 66 *post.*

[20] N.Y. CIV. PRAC. ACT § 1296 (6 & 7):

> "6. Whether there was any competent proof of all the facts necessary to be proved in order to authorize the making of the determination.
>
> "7. If there was such proof, whether, upon all the evidence, there was such a preponderance of proof against the existence of any of those facts that the verdict of a jury, affirming the existence thereof, rendered in an action in the supreme court triable by a jury, would be set aside by the court as against the weight of evidence."

[21] Even in such case, special term "may"—

> "itself pass on objections to the petition in point of law, and it shall dismiss the proceeding on the merits where it appears that the petitioner is not entitled to relief because of the provisions of section twelve hundred and eighty-five or section twelve hundred and eighty-six of this article [*i.e.,* Article 78 is not available or the proceeding was brought too late]." N.Y. CIV. PRAC. ACT § 1296.

[22] N.Y. CIV. PRAC. ACT. § 1295. Koster v. Holz, 3 N.Y.2d 639, 646, 148 N.E.2d 287, 290, 171 N.Y.S.2d 65, 70 (1958). New evidence may

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If the determination sought to be reviewed was made without a statutorily required hearing, it is to be decided by the special term of the supreme court where the petition is filed.[23] But if a triable issue is raised in such case, that is to be tried first,[24] *e.g.*, abuse of discretion in certifying a civil service list, or the rejection of a candidate for position on the ground of physical unfitness.[25]

C. *The "Final" Administrative Determination.*

Some statutes in this State declare (as do some Federal acts and statutes of other states) that the administrative determination shall be "final" or "conclusive."[26] This would appear to preclude review. The courts, holding that a legislature may "proscribe judicial review of certain actions of administrative officers and boards,"[27] will decline to review determinations declared by statute to be final, or where the intent that some administrative action is non-reviewable is to be inferred, as from the declaration in the same statute that other actions of the same administrative

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be presented to the court on such review only on issues other than whether the determination is supported by the record made before the agency, *e.g.*, that it is the result of bias or prejudice or is otherwise "tainted by illegality." Newbrand v. City of Yonkers, 285 N.Y. 164, 33 N.E.2d 83 (1941).

[23] Then the questions to be determined are of law, administrative jurisdiction, or whether petitioner's rights have been "violated" to his "prejudice." N.Y. CIV. PRAC. ACT § 1296 (1–5). To these there was added in 1951 (subd. 5-a) the question of abuse of discretion in the measure of discipline imposed by the administrative agency.

[24] N.Y. CIV. PRAC. ACT § 1295. Koster v. Holz, 3 N.Y.2d 639, 646, 148 N.E.2d 287, 290, 171 N.Y.S.2d 65, 70 (1958).

[25] Davis v. Wiener, 285 N.Y. 537, 32 N.E. 2d 828 (1941); Goldstein v. McNamara, 276 App. Div. 1072, 96 N.Y.S.2d 550 (1st Dep't 1950).

[26] See, *e.g.*, N.Y. CIVIL SERVICE LAW § 76(3); N.Y. EDUCATION LAW § 310.

[27] Guardian Life Ins. Co. v. Bohlinger, 284 App. Div. 110, 113, 130 N.Y.S.2d 705, 708 (1st Dep't 1954), *aff'd*, 308 N.Y. 174, 124 N.E.2d 110 (1954); and see F.C.C. v. R.C.A. Communications, 346 U.S. 86, 90 (1953); Switchman's Union v. Board, 320 U.S. 297, 300 (1943); N.L.R.B. v. Cheney Lumber Co., 327 U.S. 385, 388 (1946).

body or officer are subject to review.[28] The courts, however, hasten to point out that they are slow to rule that the discretion of an administrative officer or board ''may be exercised unhampered by judicial review.''[29] The intent to foreclose review will not be inferred in the absence of clear expression by the Legislature.[30]

In actuality the interdiction against review is observed only after there is ''a threshold judicial review'' to determine whether the body or officer ''misconceived or exceeded his authority.''[31] This much review will always be accorded. *Guardian Life Ins. Co.* v. *Bohlinger,*[32] is a recent instance of the courts taking the position that explicit provision in a law for judicial review of certain actions of the public officer, indicated that the legislature intended other actions by him as to which review was not provided to be nonreviewable,[33] including the decision sought to be reviewed. Nonetheless, the reviewing courts in that case exercised their ''power and duty'' to ascertain that the administrative action before them had not been in excess of the grant of statutory authority or in disregard of the standards prescribed by the Legislature.[34]

But the contention that a statute is unconstitutional which declares administrative determination of fact to be final has been rejected.[35]

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[28] Millman v. O'Connell, 300 N.Y. 539, 89 N.E.2d 255 (1949); Guardian Life Ins. Co. v. Bohlinger, *supra* note 27.

[29] Guardian Life Ins. Co. v. Bohlinger, *supra* note 27, 308 N.Y. at 180, 124 N.E.2d at 112; Schwab v. McElligott, 282 N.Y. 182, 186, 26 N.E.2d 10, 12 (1940).

[30] Jeanpierre v. Arbury, 4 N.Y.2d 238, 240, 149 N.E.2d 882, 883, 173 N.Y.S.2d 597, 598 (1958).

[31] Guardian Life Ins. Co. v. Bohlinger, 284 App. Div. 110, 113, 130 N.Y.S.2d 705, 708 (1954), *aff'd,* 308 N.Y. 174, 124 N.E.2d 110 (1954); *supra* notes 27–29.

[32] *Supra* note 31.

[33] The legislature quickly (N.Y.Sess.Laws 1956, ch. 932) amended the Insurance Law to provide that "any order, regulation or decision of the Superintendent" was subject to Article 78 judicial review.

[34] *Id.* at 183, 124 N.E.2d at 112.

[35] Matter of Rumsey Mfg. Co., 296 N.Y. 113, 71 N.E.2d 426 (1947);

A somewhat unusual situation was involved in *Dairymen's League Co-op. Ass'n v. DuMond*,[36] where one not a party before the Commissioner of Agriculture and Markets, who had granted an extension of a milk dealer's license, brought a proceeding to review the Commissioner's action. The petitioner, a competitor of the licensee, had unsuccessfully tried to become a party to the proceeding. It sought to review it, as its statutory and constitutional right, claiming it had been denied a hearing by the Commissioner. The statute did not require that there be any hearing on the license application. The effect of the procedure was that, were the license granted, there would be no review of the determination that the license was against the public interest, if a competitor such as the petitioner could not maintain the proceeding for review. Nevertheless, the court dismissed the petition, holding that the due process clause did not compel a hearing at all and none to the licensee's competitors, saying:

> It is true that, under the conclusion here reached, no one has the right to invoke judicial review under article 78 of the Civil Practice Act of a decision by the commissioner granting a license to a new member of the industry in a proceeding held on notice only to the applicant. But this result is the one which the Legislature must have contemplated in adopting the amendment to the milk control statute. Under the legislative plan, the commissioner is made the sole guardian of the public interest in the granting of licenses. Nothing in the due process clause deprives the Legislature of the power to adopt such a plan.[37]

D. *Review by a Plenary Action.*

Any discussion in this State of the method of review of administrative action will evoke reference to the case of *Staten Island Edison Corp.* v. *Maltbie*.[38] That was a suc-

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Helfrick v. Dahlstrom M. D. Co., 256 N.Y. 199, 176 N.E. 141 (1931), *aff'd,* 284 U.S. 594 (1932).

[36] 282 App. Div. 69, 121 N.Y.S.2d 857 (1953).

[37] *Id.* at 73, 75, 121 N.Y.S.2d at 863–864.

[38] 296 N.Y. 374, 73 N.E.2d 705 (1947).

cessful plenary action in equity to enjoin the enforcement of a rate order of the Public Service Commission. The basis of the complaint was an allegation that the ordered rates were confiscatory and therefore violated the utility's constitutional rights. The Commission contended that the company had no right to bring such an action, but should have brought an Article 78 proceeding to review the Commission's order. The action was upheld by a divided appellate division [39] and a four to three division in the court of appeals. The minority opinion in the court of appeals characterized the holding as ''the first in any appellate court in this State allowing a public utility corporation to try anew, in a separate suit, the factual questions,'' as to value, return, and so on, ''already submitted to, and determined by the commission to which the Legislature has delegated sole authority in that field.'' [40]

It was the limits of review in an Article 78 proceeding preventing (it appeared to the majority in both courts) an independent judicial judgment of the facts [41] when the constitutional charge of confiscation was raised, that induced the decision. Such independent review, the courts held, was compelled by the decision of the Supreme Court of the United States in *Ohio Valley Co.* v. *Ben Avon Borough,*[42] *i.e.,* ''where constitutional rights of liberty or property are involved due process requires independent judicial determination of the constitutional question in the courts.'' [43] The decision has not produced a rash of such plenary actions.

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[39] 270 App. Div. 55, 58 N.Y.S.2d 818 (3d Dep't 1945).

[40] 296 N.Y. at 386, 73 N.E.2d at 710.

[41] On this point the court of appeals cited People *ex rel.* Consol. Water Co. v. Maltbie, 275 N.Y. 357, 9 N.E.2d 961, *dis.,* 303 U.S. 158 (1938), and other cases. 296 N.Y. at 380–1, 73 N.E.2d at 709.

[42] 253 U.S. 287 (1920). See, also, cases cited 296 N.Y. at 382, 73 N.E.2d at 711.

[43] 296 N.Y. at 381–2, 73 N.E.2d at 711. See New York Post Corp. v. Kelley, 296 N.Y. 178, 71 N.E.2d 456 (1947), where an action for declaratory judgment was held to be maintainable to determine the jurisdiction of an administrative board.

It stands, however, unmodified in the dozen years that have passed since it was rendered.[44]

Although variant actions to test the validity of administrative determinations, which in common practice are reviewed in Article 78 proceedings are infrequent, there are to be found such actions brought by one other than the party to the administrative proceedings, *e.g.*, a taxpayer asserting waste of public moneys by government action claimed to be illegal.[45]

The limit to the right to review by plenary action is demonstrated by a recent decision of the court of appeals.[46] A foreign corporation brought an action for declaratory judgment against the City of New York, contending that it was not subject to the city business tax because it was engaged in interstate commerce. It also attacked the amount and correctness of the tax formula applied to it. The court of appeals ruled on the constitutional issue, holding that application of the tax to the company was not violative of the commerce clause of the federal constitution. The attack on the amount of the tax and the correctness of the formula, it held, however, could not be litigated "in a plenary suit like the present one"; that "the sole remedy" for relief on such grounds was an Article 78 proceeding.[47]

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[44] It was cited as example of one of the "situations where a trial *de novo* is a right" in Hughes v. Board of Higher Education, City of N. Y., 309 N.Y. 319, 324, 130 N.E.2d 638, 640 (1955). A trial de novo of a teacher's dismissal was held authorized, in that case, by the statute involved.

[45] Kaskel v. Impellitteri, 306 N.Y. 73, 79, 115 N.E.2d 659, 661 (1953). And without defining the kind of action to be brought, the court of appeals suggested in Wasservogel v. Meyerowitz, 300 N.Y. 125, 132, 89 N.E.2d 712, 716 (1949) that it "may be" that a landlord forced by the administration of a rent control law to reduce rent, or denied permission to increase rent, has, under the due process clause, the right to court review of his claim that the administrative action is confiscatory. One not a party to the administrative proceeding has been held not to have the right to review it in an Article 78 proceeding. *Dairymen's League Co-op. Ass'n* v. *DuMond*, 282 App. Div. 69, 121 N.Y.S.2d 857 (1953).

[46] Berkshire Spinning Assoc. v. City of N. Y., 5 N.Y.2d 347, 157 N.E.2d 614, 184 N.Y.S.2d 623 (1959).

[47] *Id.* at 359, 157 N.E.2d at 620, 184 N.Y.S.2d at 631.

II.

Scope of Review

In the American tradition there is, as we have seen,[48] the right in this State to go to the courts for at least a "threshold scrutiny" of what the administrative body or agency has done.

To how much more scrutiny is the administrative determination subject?

The opinions of the courts make it abundantly clear that they are highly reluctant to interfere with the administrative process. To no doctrine do the courts more unswervingly adhere than that they "may not substitute their judgment" for that of the administrative body or officer.[49]

To venture a capsule summary of the approach of the courts when confronted with the petition to set aside an administrative determination, it is that the administrative process would become merely a burdensome and unnecessary step if the courts were to affirm an administrative conclusion only if they would *ab initio* have decided the matter the same way.[49a] Moreover, they feel that the courts are not so plentifully staffed or so expertly staffed in many technical areas of the governmental function, as to permit or justify their supplanting their judgment for that of the administrator.

They regard themselves as courts, existing to serve justice, as required to examine the record of the administrative proceeding and the ruling, for any injustice in either; to ensure that the administrator has not exceeded statutory authority; to ensure that the procedure in the administrative agency was fair. Was the result equitable, and did the procedure by which it was reached, (although as has been said in other articles of this symposium not required to simulate court procedure) offer all the opportunity to present the petitioner's side of the matter that the law and fairness called for? These are, in essence, the questions which courts must not have to answer in the negative, if they would affirm the administrative determination.

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[48] *Supra,* Part I (C).

[49] Miller v. Kling, 291 N.Y. 65, 69, 50 N.E.2d 546, 548 (1943). See subtopics A and B, *post.*

[49a] People *ex rel.* Consolidated Water Co. v. Maltbie, 275 N.Y. 357, 9 N.E.2d 961 (1937); LaForge v. Kennedy, 8 App. Div. 2d 143, 186 N.Y.S.2d 478 (1959); Strauss v. University of State of New York, 282 App. Div. 593, 597, 125 N.Y.S.2d 821, 825 (1953).

The words of art used in the opinions as the tests are likely to be "reasonable," "not arbitrary or capricious," "not abuse of discretion," "warrant in the record," "supported by substantial evidence in the record as a whole," not "in excess of authority." They are the technical phrases for defining the basic, fundamental measure to which the administrative action is put by the courts. The formulation of the tests flows logically from the role of the courts in the American scheme of government, and their role, therefore, in administrative law. But the mere growth of this verbiage demonstrates that in application it is not easy always for the courts to reach a result as to whether an agency determination has failed or passed the tests. Division in appellate courts and reversal by one court of another in a particular case bear this out.

How the tests which have emerged from the courts' conception of their part in this method of government are applied, and how agency determinations fare thereunder are considered in the succeeding pages of this article.[50]

A. *When the Determination was made without a hearing.*

Such determinations come to the courts without a record having been made before the administrative agency on the facts. If a question of fact is raised by the petition and answer in the proceeding for review, a trial is had then, and the reviewing court weighs the administrative determination in the light of such proof. Absent any such trial, the court has before it the material on which the administrative officer acted in reaching his decision. (These have been appended to his answer.) [51]

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[50] The starting point for any examination of judicial review in this State should be the, frequently judicially cited, pages devoted to that subject in ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK (1942) by the author of the introductory article in this symposium, Robert M. Benjamin. It is well to follow this with a reading of a later article by Mr. Benjamin in 48 COL. L. REV. 1 (1948).

First, the court will decide whether the administrative action was within the bounds of its authority, that is to say, it must find that the administrative agency has acted "within the law." The court of appeals has said so with marked directness:

> True it is that, as a reviewing court we owe deference to the Authority—an administrative board—in the exercise of its discretion *within the law.* That discretion, however, cannot be invoked outside the law. It is for the courts, not for administrative boards, to determine what action is within, or without, the law.[52]

Here the courts are guarding the area which our system of government entrusts to their hands and their hands alone.

Next, if the statute specifically or impliedly vests "discretion" in the administrative body or agency, the only question the court will decide on this score is whether there was an "abuse of discretion." The petitioner must show a "clear legal right" to what has been denied him.[53] As distinguished from the topic discussed in the preceding paragraphs, the courts regard the area of discretion as one intended to be left to the administrative body and will intrude upon it as rarely as possible. The legislature, it is held, may vest discretion in the administrative agency and set the "field of administrative discretion. Into that field the courts may not enter." [53a] A common way of putting it is that the court will not substitute its judgment for that of the administrative agency.[54]

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[51] *Supra*, Part I, B.

[52] Barry v. O'Connell, 303 N.Y. 46, 52–3, 100 N.E.2d 127, 130 (1951) [italics by the court]; Elite Dairy Products v. Ten Eyck, 271 N.Y. 488, 493, 3 N.E.2d 606, 608 (1936).

[53] Small v. Moss, 277 N.Y. 501, 507, 14 N.E.2d 808, 810 (1938).

[53a] *Ibid.*

On the first occasion, when a proceeding was brought under a new amendment to the Civil Practice Act (subd. 5-a of section 1296), giving to the courts the power to review for "abuse of discretion" the measure of punishment in disciplinary proceedings, the appellate division, third department, said of the responsibility this placed upon them:

> . . . [T]his grant of power must be reasonably construed in the light of the settled principles governing the relationship between the courts and administrative agencies. Obviously, the words 'abuse of discretion' cannot reasonably be given so broad an interpretation as to allow the courts to substitute their judgment, as to the appropriate measure of discipline, for that of the administrative agency. If that were done, the power of administration, would, to a large extent, be transferred from the admintrative agency to the courts. . . .[55]

The delegation of discretion to the agency must, however, be express or "by such clear implication that the legislative intent is clear." It must also be accompanied, again expressly or by clear implication, "by standards by which the administrative official is to be guided."[56]

In a case to which the courts turn with much frequency for quotation after nearly a score of years, *Stracquadanio* v. *Department of Health*,[57] the court of appeals declared the boundaries of review, where the official has been given discretionary leeway, to be that one who challenges the official action must "establish a clear legal right" "to his remedy'' and if the official action ''involved the exercise of a discretionary power, our inquiry is limited to a determination whether the record discloses circumstances which leave no possible scope for the reasonable exercise of that discretion.''[58]

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[54] *Supra* note 53; *infra* note 55. Marbury v. Cole, 286 N.Y. 202, 208, 36 N.E.2d 113, 116 (1941).

[55] Stolz v. Board of Regents, 4 App. Div. 2d 361, 364, 165 N.Y.S.2d 179, 182 (1957).

[56] Barton Trucking Corp. v. O'Connell, 7 App. Div. 2d 36, 38–39, 180 N.Y.S.2d 686, 689 (1958). The court observed that the history and purpose of a statute in a particular field may serve as a clue to the legislative intent in vesting discretion. *Id.* at 39–40, 180 N.Y.S.2d at 690.

[57] 285 N.Y. 93, 32 N.E.2d 806 (1941).

In *Gambino v. State Liquor Authority,*[59] a per curiam opinion of the appellate division, first department, upheld a ruling made in the exercise of statutorily granted discretion, saying:

> It is settled that the courts will not disturb the exercise of administrative discretion . . . unless the action complained of be deemed arbitrary or capricious and the . . . determination should be sustained if there is any reasonable basis for it. . . .
>
> Therefore, the test to be applied is whether the record discloses circumstances which leave no possible scope for the exercise of the Authority's discretion. . . . This is a burden the petitioners must discharge and on the record before us it cannot be held that they did. . . .
>
> There is reasonable basis in law and on the evidence to sustain the action of the Authority. . . .[60]

This is not to say that the courts leave the field of discretion to the administrative body or agency unrestrained. Here the test of ''arbitrary and capricious'' or ''unreasonable'' comes into opinions.[61] Then we find declarations that it is ''the duty of the courts to set at naught arbitrary and unfounded administrative holdings'';[62] that courts have

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[58] *Id.* at 96, 32 N.E.2d at 808. And see Elite Dairy Products v. Ten Eyck, 271 N.Y. 488, 495, 3 N.E.2d 606, 609 (1936).

[59] 4 App. Div. 2d 37, 162 N.Y.S.2d 723 (1957), *aff'd,* 4 N.Y. 2d 997, 152 N.E.2d 534, 177 N.Y.S.2d 513 (1958).

[60] *Id.* at 38–39, 162 N.Y.S.2d at 725–726.

[61] For example, Monachino v. N. Y. State Liquor Authority, 6 App. Div. 2d 378, 178 N.Y.S.2d 22 (1958), where denial of application for renewal of license was held "not arbitrary or capricious and that facts were presented which permitted the Authority to act within its discretionary power." *Id.* at 380, 178 N.Y.S.2d at 24. See, also, Fink v. Cole, 1 N.Y. 2d 48, 53, 133 N.E.2d 691, 694, 150 N.Y.S.2d 175, 179 (1956); Small v. Moss, 277 N.Y. 501, 507, 14 N.E.2d 808, 810 (1938).

[62] Matter of Rumsey Mfg. Corp., 296 N.Y. 113, 118, 71 N.E.2d 426, 428 (1947).

"inherent power" "to review the exercise of discretion or the abuse thereof";[63] that "arbitrary"[64] exercise of discretion will be annulled.[65]

B. *When the determination was made after a hearing.*

In these cases the court in reviewing the administrative determination has before it the minutes of an administrative hearing at which evidence on the facts was produced.

Before we search into the terminals of judicial review of such a record, we would comment on the categorizing of standards on review, into those applicable to determinations made after a hearing[66] and those applicable to determinations made without a hearing. Actually, in the opinions there is no such distinct separation. To be sure, when there has been a hearing, there is the survey of the record by the reviewing court, as will be seen farther on in this portion of this article. But the standards applied to review of determinations made without a hearing are also adverted to on review of the determination made after a hearing. So, in *People ex rel. Hudson-Harlem Co.* v. *Walker,*[67] the court of appeals said:

> There was adequate evidence [before the agency] upon which it could exercise its judgment. . . . There was *no abuse of discretion;* its decision was *not arbitrary* or *capricious* or contrary to law. The evidence before the board was conflicting . . . and [there having been] presented a fair question of fact . . . upon which the *discretion* of the board was exercised, it was error for the

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[63] McCall Corp., v. Gerosa, 2 App. Div. 2d 358, 361, 156 N.Y.S.2d 111, 114 (1956).

[64] The "arbitrary" test is also applied where there is no clear cut factor of exercise of discretion, but the administrative determination is deemed not a "reasonable" one under the law and circumstances (B, *post*).

[65] Gruner v. McNamara, 298 N.Y. 395, 398, 83 N.E.2d 850, 851 (1949); Cowen v. Reavy, 283 N.Y. 232, 237, 28 N.E.2d 390, 392 (1940).

[66] When we speak of a "hearing" in this context, we refer to one required by a statute. An agency hearing held although not required is not weighed in the same way by the courts.

[67] 282 N.Y. 400, 26 N.E.2d 952 (1940).

> Special Term to substitute its judgment for that of the board. [Italics supplied.][68]

A case in which, on a petition for an order in the nature of mandamus, a trial of issues was had, gave rise to an opinion in the court of appeals in which the factor of the exercise of discretion by the administrative agency was discussed at some length.[69] The court held that where the agency had "power to exercise discretion," the courts lacked the right to "substitute" their "judgment" for the administrative decision. The opinion then went on to say that if the administrative function "were to be regarded as quasi-judicial" and the proceeding on review "to resemble certiorari," "the same result would follow, if the board acted upon substantial evidence within its jurisdiction and without committing material error of law. . . ." "The outcome of the appeal herein depends, not upon distinguishing between the function of this board as administrative or quasi-judicial, but on whether it had power to exercise its discretion in view of the surrounding facts and circumstances. . . . The issue goes beyond whether the action of the board . . . is reviewable by certiorari, or whether the remedy is by mandamus. . . . Neither remedy is available . . . if . . . the board exercised its discretion within its jurisdiction."[70] The court found distinguishable a case where "the undisputed facts left no basis for the exercise of discretion."[71]

And take note of the language of a recent memorandum decision, upholding an administrative determination made after a hearing: "We may not say from the record now before us that the Comptroller's findings are *arbitrary, capricious* or unsupported by substantial evidence." [Italics supplied.][72] Reference to the full opinions in many of the cases which will be cited here on the subject of review of the record made at the administrative hearing, will disclose similar language by the courts, in the affirmative or negative, as the case may be.

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[68] *Id.* at 406, 26 N.E.2d at 955.

[69] Gimprich v. Board of Education of City of New York, 306 N.Y. 401, 118 N.E.2d 578 (1954).

[70] *Id.* at 406, 407, 408, 118 N.E.2d at 580, 581.

[71] *Id.* at 409, 118 N.E.2d at 581.

[72] Morrissey v. Levitt, 9 App. Div. 2d 599, 189 N.Y.S.2d 501 (1959).

We return to the special matter of review of the hearing record. On this record, the administrative agency or official has reached a factual conclusion. For that, as in the matter of discretion,[73] the courts will not substitute their own judgment.[74] "Nothing is better settled," the court of appeals said in *Burke* v. *Bromberger*,[75] where the appellate division had "substituted" "its views on a question of fact" for that of the administrative officer, "than that the court had no such power."

Where lower courts have reversed on "the facts," they in turn have been reversed on appeal,[76] upon the ground that there is no right to reverse the administrative determination on such basis.

In *LaForge* v. *Kennedy*, the majority opinion by Justice Breitel, upholding dismissal of a policeman after a hearing, concluded: "the test is not what the court believes, or what it thinks it would believe if it had seen and heard the witnesses, but whether the Police Commissioner or his trial commissioner could have reasonably believed the evidence supplied." [77]

What the courts look for in the record was described with such supreme clarity by the New York Court of Appeals in 1940 that the principle was written into the Federal Administrative Procedure Act enacted in 1946.[78] The judicial search of the hearing record is for the presence of "substantial evidence" in the "record as a whole."

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[73] *Supra*, this Part II, A.

[74] Kilgus v. Board of Estimate of the City of N.Y., 308 N.Y. 620, 627, 127 N.E.2d 705 (1955); Burke v. Bromberger, 300 N.Y. 248, 250, 90 N.E.2d 61, 62 (1949); Miller v. Kling, 291 N.Y. 65, 50 N.E.2d 546 (1943); Humphrey v. State Ins. Fund, 298 N.Y. 327, 83 N.E.2d 539 (1949); Kopec v. Buffalo Brake Beam, etc., Iron Works, 304 N.Y. 65, 107 N.E.2d 70 (1952).

[75] *Supra* note 74, at 250, 90 N.E.2d at 62.

[76] Miller v. Kling, 291 N.Y. 65, 69, 50 N.E.2d 546, 548 (1943).

[77] 8 App. Div. 2d 143, 151, 186 N.Y.S.2d 478, 485 (1st Dep't 1959).

[78] 5 U.S.C.A. § 1009(e). This at least chronological history of the

The pioneer opinion of the court of appeals which crystallized the "substantial evidence" rule was the *Stork Restaurant* case.[79] As there stated it is:

> A finding is supported by the evidence only when the evidence is so substantial that from it an inference of the existence of the fact found may be drawn reasonably. A mere scintilla of evidence sufficient to justify a suspicion is not sufficient to support a finding upon which legal rights and obligations are based. That requires 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' (*Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U.S. 197, 229.) The same test is applied in trials before a court and jury. Evidence which is sufficient to require the court to submit a question of fact to a jury is sufficient to support a finding by the administrative board. (*Cf. National Labor Relations Board* v. *Columbian E. & S. Co.,* 306 U.S. 292.)
>
> There is often greater difficulty in applying the test than in formulating it. The evidence produced by one party must be considered in connection with the evidence produced by the other parties. Evidence which unexplained might be conclusive may lose all probative force when supplemented and explained by other testimony. The Board must consider and sift all the evidence—accepting the true and rejecting the false—and must base inferences on what it has accepted as true. Choice lies with the Board and its finding is supported by the evidence and is conclusive where others might reasonably make the same choice. . . .
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> * * *
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> The record considered as a whole clearly supports the inference . . . The undisputed facts are consistent with that inference. We do not decide whether they are consistent with any other inference or whether the testimony in favor of the Stork Club is true. We decide only that

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scope of review set forth in the Federal Act, is sometimes not noticed. Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 481–2 (1951); see Phinn v. Kross, 8 App. Div. 2d 132, 135, 186 N.Y.S.2d 469, 472 (1959).

[79] Stork Restaurant v. Boland, 282 N.Y. 256, 26 N.E.2d 247 (1940).

the decision and order of the Board is sustained in all respects by the evidence.[80]

The court's opinion may sometimes merely say that there was or was not substantial evidence in support of the administrative finding,[81] but there is no room for doubt that what is sifted is the "record as a whole"—the evidence in support of the administrative finding and the evidence "opposed to it." [82]

Once substantial evidence in the record as a whole is found in support of the administrative determination, the inference to be drawn therefrom is left to the agency. Though a contrary inference could permissibly be drawn, the administrative ruling will not be reversed.[83]

Again, however, the disposition of the judiciary not to upset the administrative judgment on facts does not mean that it will not do so where it finds that there is not substantial evidence in the record to support such judgment.[84]

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[80] *Id.* at 273–4, 26 N.E.2d at 255.

[81] See, *e.g.*, Miller v. Kling, 291 N.Y. 65, 68, 50 N.E.2d 546, 547 (1943); Humphrey v. State Ins. Fund, 298 N.Y. 327, 332, 83 N.E.2d 539, 541 (1949).

[82] McCormack v. National City Bank, 303 N.Y. 5, 9, 99 N.E.2d 887, 888 (1951). See Phinn v. Kross, 8 App. Div. 2d 132, 186 N.Y.S.2d 469 (1959), for analysis of the rule as discussed in a number of the decisions commencing with the *Stork Restaurant* case. In the *Phinn* case, the administrative determination was annulled and the matter remanded upon the ground that there was "no substantial evidence on the whole record" to establish the most serious charge for which an employee of the New York City Correction Department had been dismissed.

[83] Matter of Rumsey Mfg. Corp., 296 N.Y. 113, 117–8, 71 N.E.2d 426, 428 (1947). The court quoted from Camardo v. N. Y. State Rys., 247 N.Y. 111, 118, 159 N.E. 879, 881 (1928), a personal injury case: "Only where the circumstances admit of only one inference may the court decide as a matter of law what inference shall be drawn."

[84] Newton v. County of Erie, 7 App. Div. 2d 29, 180 N.Y.S.2d 163 (1958); Haywood v. Craig Colony, 7 App. Div. 2d 69, 72, 180 N.Y.S.2d 701, 704 (1958); Bureau of Underwriters v. Superintendent of Insurance, 6 App. Div. 2d 73, 83, 174 N.Y.S.2d 836, 845 (1958), *lv. to app. granted,* 5 N.Y.2d 706, 153 N.E.2d 797, 179 N.Y.S.2d 1026 (1958).

C. *The "Legal Residuum" Rule.*

Is there a quality of proof as well as the substantiality of evidence which must support the determination? The rules of evidence controlling in the courts do not control in administrative procedure.[85] The question is whether any and every kind of evidence received at the hearing is sufficient to support the administrative decision, if such evidence is substantial in light of the opposing evidence in the record.

In 1916, in *Carroll* v. *Knickerbocker Ice Co.,*[86] the New York Court of Appeals laid down what has come to be known as the *legal residuum rule.* As formulated in the *Carroll* case, it is that "There must be a residuum of legal evidence"[87] to support the administrative determination, notwithstanding that any evidence including hearsay may be received at the administrative hearing, and that common law or statutory rules of evidence and procedure do not govern. The case arose out of an award in a workmen's compensation case. But the rule as stated was not so limited and has not been so limited in citation and application.[88]

Controversy has swirled since the *Carroll* decision as to whether the "legal residuum rule" persists[89] as laid down in that case. The rule continues to be at least cited;[90] it is much criticized by some,[91] dismissed as of little consequence by others.[92]

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[85] Professor Anderson's article on Evidence, in this symposium has discussed this.

[86] 218 N.Y. 435, 113 N.E. 507 (1916).

[87] *Id.* at 440, 113 N.E. at 509.

[88] Indeed the Workmen's Compensation Law was amended in 1922 to declare hearsay evidence in such cases sufficient to establish the accident and injury, if corroborated by circumstantial or other evidence. N.Y. WORKMEN'S COMPENSATION LAW § 118.

[89] Professor Anderson in his article notes that "there is still some life" in the rule.

[90] Cases *infra* this subtopic.

Cited by some as supporting and by others as weakening the legal residuum rule is *Altschuler v. Bressler*,[93] also a workmen's compensation case. The court of appeals here said of the *Carroll* decision that "the Court did not intend to formulate a rule which would hamper the Commission from making an award, which is shown to be 'fair and just' by all the evidence, including 'hearsay statements' which throw light on the claim."[94] So construing the rule, the court in the *Altschuler* case appears to have affirmed it. Certainly it was trying for reconciliation of the two decisions, for it held that the evidence in the case before it was "sufficient for that"[94a] and its decision "not inconsistent" with the *Carroll* decision. The distinction, the court held, was that hearsay testimony was contradicted in the *Carroll* case by established facts and circumstances but corroborated by them in the *Altschuler* case.[95]

As for subsequent cases, in *Reynolds v. Triborough Bridge & T. Authority*,[96] the appellate division, first department, annulled a determination of dismissal of an employee made under the Civil Service Law after a hearing. Much of the testimony had been hearsay. Such testimony was admissible, said the court, and all that is required is that "there be a 'residual' of competent evidence of probative force so substantial as to support the determination of the agency," citing the *Carroll* case.[97] This opinion's analysis of the judicial function on review, was that there is a blend of quality with quantity of evidence which the court must find in support of a determination in order to affirm:

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[91] BENJAMIN, *op. cit. supra* note 50, at 189–194. WIGMORE, EVIDENCE §§ 4b, 4c (3d ed. 1940); DAVIS, ADMINISTRATIVE LAW §§ 140–5 (1958).

[92] STASON AND COOPER, CASES AND OTHER MATERIAL ON ADMINISTRATIVE TRIBUNALS 401–5 (1957).

[93] 289 N.Y. 463, 46 N.E.2d 886 (1943).

[94] *Id.* at 469, 46 N.E. 2d at 889.

[94a] That is, sufficient for making a fair and just award.

[95] Be it remembered that the Workmen's Compensation Law involved in both cases had been amended in the meantime (*supra* note 88).

[96] 276 App. Div. 388, 94 N.Y.S.2d 841 (1951).

[97] *Id.* at 390, 94 N.Y.S.2d at 843.

> It is only when there is *no substantial evidence* of a *competent, probative force* to sustain the administrative conclusion that a court is warranted in setting it aside. . . . The rule is simple; its application, however, is beset with many difficulties. . . . In reviewing administrative determinations, a court must consider on the one hand that such determinations may not be disturbed where there is substantial evidence to support them—evidence sufficient to satisfy a reasonable man, and on the other hand a reviewing court must also consider that insufficiency of evidence is, in the eyes of the law, no evidence—certainly no evidence of any substantial character. . . . A reviewing court has more than a passive, acquiescent function to perform when it passes upon the determinations of administrative agencies; it has a real judicial function to exercise where it reviews the sufficiency and the substantiality of the evidence upon which those agencies have acted.[98] [Italics supplied.]

Two fairly recent court of appeals decisions have mentioned the legal residuum rule. The earlier of these two cases is *Kopec* v. *Buffalo Brake Beam, etc., Iron Works.*[99] The dissenting appellate division opinion in the case (a workmen's compensation case)[100] had said that "despite some inconsistencies of proof in the record . . . there is residuum[101] of proof" as to disability and that the accident was the producing cause. Judge Fuld's opinion in the court of appeals held that this finding was "beside the point," for, he said:

> [W]e are here concerned, not with the 'legal residuum' doctrine . . . , but with the substantial evidence rule. Under the test prescribed by our decisions for the judicial review of quasi-judicial determinations, the evidence supporting the findings of an administrative tribunal must be 'viewed in the light of the record as a whole' . . . , since 'Evidence which unexplained might be conclusive may lose all probative force when supple-

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[98] *Id.* at 392–393, 94 N.Y.S.2d at 845–846.

[99] 304 N.Y. 65, 106 N.E.2d 12 (1952).

[100] 278 App. Div. 867, 104 N.Y.S.2d 391 (1951).

[101] The word "legal" was not used with the word "residuum."

> mented and explained by other testimony.' . . . That principle in mind, the quasi-judicial determination is to be sustained if the reviewing court concludes that others might reasonably reach the same result.[102]

One of the last words on the subject by the court of appeals, if not the very last word, was approximately five years ago in *Doca v. Federal Stevedoring Co.*,[103] where Judge Desmond said categorically that while hearsay evidence is admissible in compensation proceedings, "there must be a residuum of common law evidence." And he cited the *Carroll* case. But he said that the rule was not applicable in the case there before the court because "it governs when the party against whom the award is made questions the sufficiency of the proof,"[104] and no such question was being raised in that case.

After stretches of time during which the rule is not mentioned in any case, it reappears in discussion if not in reaffirmation.

Within the year, in a dissenting opinion, Justice Halpern (appellate division, fourth department), in *Quirk v. Kelly*,[105] made an extended examination of the rule. But he candidly was unsure whether it is still to be reckoned with. At one point of his opinion his language was: "Even if it is assumed that the 'legal residuum rule' is still the law of New York. . . ."[106]

Agreeing with text writers he cites who are critical of the rule,[107] he declares as the "better view" "that the only test upon review of quasi-judicial determinations should be the substantial evidence test and that an additional requirement that there be a residuum of legally competent evidence should not be injected into the process.''[108] Justice Halpern turns to the test formulated by Judge Learned Hand, whether ''in the end, the finding is supported by the kind of evidence on which responsible persons are accustomed to rely in serious affairs.''[109] Finally, Justice Halpern recalls that the legal residuum rule, applies, (if it still applies anywhere) ''only to the evidence upon a quasi-judicial hearing held pursuant to statutory direction. It has never been held to be applicable to and by its nature it cannot reasonably be extended to administrative action taken in accordance with statutory authority without a hearing.''[110]

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[102] 304 N.Y. 71, 106 N.E.2d at 15.

[103] 308 N.Y. 44, 123 N.E.2d 632 (1954).

[104] *Id.* at 52–53, 123 N.E.2d at 636.

[105] 7 App. Div. 2d 463, 184 N.Y.S.2d 761 (1959).

[106] *Id.* at 469, 184 N.Y.S.2d at 767. The "status of the residuum rule is by no means crystal clear in the federal courts" either. U. S. *ex rel.* Dong Wing Ott v. Shaughnessey, 116 F. Supp. 745, 750 (1953).

[107] *Id.* at 469, 184 N.Y.S.2d at 767, authorities there cited.

How does the ''legal residuum rule'' operate in the ''substantial evidence'' test if the rule is still viable? At least one text writer sees it as requiring, after the court has concluded that the administrative determination is supported by substantial evidence on the record as a whole, a re-examination of the record to ascertain whether or not some legal evidence is also present.[111]

D. *Review of some particular kinds of agency determinations.*

(1)

Administrative Rule Making

One not uncommon activity of administrative agencies is the adoption of rules and regulations. A rule or regulation, if challenged, will be declared invalid only in the event that ''it is so lacking in reason for its promulgation that it is essentially arbitrary,"[112] and will be upheld if there is a "rational basis" for it.[113]

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[108] *Ibid.*

[109] National Labor Relations Board v. Remington Rand, 94 F. 2d 862, 873 (1938), *cert. den.,* 304 U.S. 576 (1938).

[110] 7 App. Div. 2d at 469, 184 N.Y.S.2d at 767–768.

[111] *Supra,* Part II, B. FORKOSCH, ADMINISTRATIVE LAW 431–2 (1956). Professor Forkosch does not regard this "static and arbitrary requirement" as necessary in light of the substantial evidence rule. And see, BENJAMIN, *op. cit. supra* note 50, at 189–194.

In a case where the statute authorized the agency to devise remedies it deemed appropriate to "effectuate" the legislative policy of the statute, the court commented that the agency had "wide discretion in its choice of a remedy . . . and the courts will not interfere except where the remedy selected has no reasonable relation" to the evil to be corrected.[114]

There is a further standard on review when the validity of an agency rule or regulation is questioned. It is that the statute pursuant to which these are promulgated must provide "standards or limitations" upon and within which the agency may then act.[115] This ties in with judicial alertness to ensure that administrative action shall not be unfair or arbitrary and shall be within the law.[116]

(2)

Administrative Construction of Statutory Language

Necessarily, the administrative agency must construe the language of the statute it is applying. Here is an area which is usually distinctly the province of the courts. Before the proceeding reaches the courts, the administrative agency will, however, often have had to find the meaning of a term used in the statute and not theretofore judicially interpreted. Two classic opinions in this state, both written for the court of appeals within months of each other in 1945 by Judge Desmond, now Chief Judge, declared that the reviewing court's function here, too, is limited. Drawing authority from *N. L. R. B.* v. *Hearst Publications*, a decision of the previous year by the Supreme Court of the United States,[117] Judge Desmond said in the first of his two opinions on the subject, *Mounting & Finishing Co. v. McGoldrick:*[118]

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[112] Stracquadanio v. Department of Health, 285 N.Y. 93, 97, 32 N.E.2d 806, 808 (1941).

[113] *Id.* at 101, 32 N.E.2d at 810.

[114] Holland v. Edwards, 307 N.Y. 38, 119 N.E.2d 581 (1954), quoting at 46, 119 N.E.2d at 585 from Siegel Co. v. Trade Comm., 327 U.S. 608, 611, 612–3 (1946).

[115] Packer Collegiate Inst. v. University of State of New York, 298 N.Y. 184, 189, 81 N.E.2d 80, 82 (1948); and see Small v. Moss, 279 N.Y. 288, 299, 18 N.E.2d 281, 285 (1938).

[116] *Supra*, Part II of this article, *in passim*.

> . . . Of course, statutory construction is the function of the courts 'but where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited' (*Board* v. *Hearst Publications,* 322 U.S. 111, 131). The administrative determination is to be accepted by the courts 'if it has "warrant in the record" and a reasonable basis in law' (same citation.) 'The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body' (*Rochester Tel. Corp.* v. *U.S.,* 307 U.S. 125, 146).[119]

The opinion continued:

> . . . We have no difficulty in discovering a factual basis for the Comptroller's conclusion that petitioner was not buying the paper, wood, etc., 'for resale'. Nor does such a conclusion lack reasonable support in law.[120]

In the second opinion, *Red Hook Cold Storage Co., v. Dep't of Labor,*[121] Judge Desmond repeated the principle (which in the *Mounting & Finishing Co.* case had caused the court to accept the New York City Comptroller's construction of the word "resale" in the New York City sales tax local law) applying it to the construction by the State Department of Labor of the word "factories" in the Labor Law.

In later cases, the court of appeals has held that the administrative agency's application of the phrase "substantial obligation'' in a statute was one for it to make as situations came before it, and was not to be disturbed if it had ''warrant in the record,'' a ''reasonable basis in law'' and was ''not arbitrary or capricious.''[122] The court has accepted the construction by the State Liquor Authority of the phrase ''any gambling'' in the Alcoholic Beverage Control Law as embracing both casual and professional gambling, with the conclusion that the Authority's determination revoking a liquor license because the licensee permitted social gambling on licensed premises ''may not be set aside as arbitrary or capricious but will be upheld.''[123]

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[117] 322 U.S. 111 (1944).

[118] 294 N.Y. 104, 60 N.E.2d 825 (March 1945).

[119] *Id.* at 108, 60 N.E.2d at 827.

[120] *Ibid.*

[121] 295 N.Y. 1, 9, 64 N.E.2d 265, 268 (November 1945).

This is not to say that the courts do not reject administrative construction of statutory language. The court of appeals annulled the State Liquor Authority's determination in *Barry v. O'Connell*,[124] when it denied a license on the basis of ''need'' for a package store instead of using the ''statutory standard of 'convenience and advantage.' '' The court held that the Authority thereby ''disregarded the standard fixed by the Legislature and arrogated to itself power in excess of that which it possesses as an administrative board.''

At first blush it is perhaps something of a shock that courts will accept an administrative agency's construction of statutory language within the range indicated in these cases. But in fact this quite fits in with the conditional deference accorded to administrative determinations by the courts, which is observed in the opinions on all phases of judicial review of administrative proceedings.

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[122] Park East Land Corp. v. Finkelstein, 299 N.Y. 70, 74–5, 85 N.E.2d 869, 871–872 (1949).

[123] Katz's Delicatessen v. O'Connell, 302 N.Y. 286, 289, 97 N.E.2d 906, 907 (1951). The opinion cited for its conclusion, *Mounting & Finishing Co.*, and the cases therein relied on, *Board v. Hearst Publications* and *Rochester Tel. Corp. v. U. S., supra* note 117, 118. Other decisions in the same vein are Hotel Association of N.Y.City v. Weaver, 3 N.Y.2d 206, 212–3, 215, 144 N.E.2d 14, 17, 18, 165 N.Y.S.2d 17, 22–23, 24 (1957) and Young v. Bragalini, 3 N.Y.2d 602, 148 N.E.2d 143, 170 N.Y.S.2d 805 (1958).

[124] 303 N.Y. 46, 48, 52–3, 100 N.E.2d 127, 128, 130–131 (1951).

Conclusion

In one opinion on review of an exercise of discretion, it was said not long ago that the administrative determination would not be set aside because it was not ''shocking to one's sense of fairness.''[125] Another opinion has held that an administrative determination, for which ample evidentiary and ''equitable basis'' exists, would not be disturbed.[126] Still another opinion, upholding an administrative finding as supported by the record as a whole, made the final point that the commission hearing was ''fair.''[127] By the same token, determinations which the courts ''view as arbitrary'' and wherein the ''procedure followed'' is regarded as ''unfair and capricious'' will be annulled.[128] From words such as these and the implicit tenor of the courts' opinions on review of administrative determinations, it is permissible to deduce the judicial conception of the scope of such review to be, that it be so much as is required to hold the administrative process within lines that will accord fairness and justice to those who come before government agencies.

The right to judicial review, its scope, the measure of review, the formulae for review, as written in statutes and court decisions, all are for the purpose of maintaining a nice balance between the administrative process and the judicial function. On the one hand there is the oft repeated need for the flexibility of the administrative process in government; of its increased need in a government grown and ever growing in size and volume of business, concomitant with the growth in size and complexity of the American community. There is also the even greater need in these circumstances for judicial vigilance that the citizen's right to fair dealing be not sacrificed to administrative facility. The conscientious public official is the first to acknowledge this.

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[125] Stolz v. Board of Regents, 4 App. Div. 2d 361, 364, 165 N.Y.S.2d 179, 182 (1957), quoting from a decision Matter of City of Rochester [Smith St. Bridge], 234 App. Div. 583, 585, 255 N.Y.Supp. 801, 805 (1932), in an action where a condemnation award was not set aside because it did not "shock the sense of justice of the court."

[126] Park East Land Corp. v. Finkelstein, 299 N.Y. 70, 76, 85 N.E.2d 869–872 (1949).

[127] Castle Hill Beach Club v. Arbury, 2 N.Y.2d 596, 142 N.E.2d 156, 162 N.Y.S.2d 1 (1957).

[128] Adler's Creamery Inc. v. Commissioner of Agriculture and Markets, 9 App. Div. 2d 582, 583, 189 N.Y.S.2d 505, 507 (1959).

The courts, as we have seen, are aware of both needs and endeavor to satisfy them.

"The success of judicial review," one jurist has said,[129] "has rested more on the implications of its existence and availability than upon an explicit exercise of power."

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[129] Bergan, J., writing for the court in Pollack v. Conway, 276 App. Div. 435, 438, 95 N.Y.S.2d 553, 556 (3d Dep't 1950).

Comments

Annulment For Fraud In New York

In 1881, Joel Prentiss Bishop, writing on fraud in the marriage contract, apologetically opened his discussion by saying:

> This topic is probably the most difficult of treatment of all connected with the law of marriage and divorce. The difficulties are from two sources; first its inherent nature; secondly, extraordinary muddlings from the courts. Should an author, discussing it, present all the views, and those only which have heretofore occurred to the minds of judges, and found embodiment in their utterances, he would lead his readers into a labyrinth of contradictory and chaotic things, out of which no practitioner could easily find a path.[1]

Seventy-five years have passed, and with but a superficial glance at the case law relating to annulment for fraud in New York, it can be seen that Mr. Bishop's statement is as true today as it was when written. Actually, although Mr. Bishop was not speaking of New York law in particular, his statement is more applicable today in relation to New York law than it was in 1881.

It is the purpose of this discussion to give a brief history of the New York rule concerning annulments for fraud, then discuss in particular the impact of *Woronzoff-Daschkoff v. Woronzoff-Daschkoff*,[2] and finally conclude with an attempt to indicate the circumstances which will satisfy the statutory requirement of fraud as a ground for annulment.[3]

Under the so called "old rule," established by lower court decisions in New York prior to 1903, a marriage would be annulled on the grounds of fraud only if the fraud concerned something essential to the marriage. Something essential to the marriage was that which would prevent the party from entering the marriage relation or preclude performance of the duties of the marriage. Under that rule, fraud in the form of a misrepresentation as to social position, health, or fortune was not a sufficient ground to annul a marriage.[4]

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[1] Bishop, Marriage and Divorce 165 (6th ed. 1881).

[2] 303 N.Y. 506, 104 N.E.2d 877 (1952).

[3] N.Y. Domestic Relations Law § 7, providing, in part, as follows:

That rule was abrogated by the court of appeals in the case of *di Lorenzo v. di Lorenzo* [5] in 1903. In that case defendant wife had told the plaintiff, with whom she had been intimate, that during his absence from the state she had given birth to a child of which he was the father. She exhibited the child to plaintiff; as a result of her representations, plaintiff married her. Actually, the defendant had never given birth to the child, but had procured it solely for the purpose of inducing the plaintiff to marry her. The court gave plaintiff judgment, saying:

> . . . [T]hrough misrepresentation of some fact, which was an essential element in the giving of his consent to the contract of marriage and which was of such a nature as to deceive an ordinarily prudent person, the court is empowered to annul the marriage.[6]

The court thus appeared to be treating marriage, with respect to deliberate fraud, as an ordinary contract.

In the years that followed, the lower courts, for the most part, cited the *di Lorenzo* case and followed it.[7] However,

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A marriage is void from the time its nullity is declared by a court of competent jurisdiction if either party thereto:

* * * * *

4. Consents to such marriage by reason of force, duress or fraud;

* * * * *

The quoted provision of the statute has remained substantially unchanged since the statutory revision of 1830, 2 N.Y. REV. STAT. 142.

[4] Fisk v. Fisk, 6 App. Div. 432, 39 N.Y.Supp. 537 (1896); Klein v. Wolfsohn, 1 Abb. N. Cas. 134 (1876).

[5] 174 N.Y. 467, 67 N.E. 63 (1903).

[6] *Id.* at 474, 67 N.E. at 65.

[7] See Rosza v. Rosza, 117 Misc. 728, 191 N.Y.Supp. 868 (Sup. Ct. 1922); Libman v. Libman, 102 Misc. 443, 169 N.Y.Supp. 900 (Sup. Ct. 1918);

they sometimes refused to apply the rule of that case, usually when application of the *di Lorenzo* rule would create a totally new ground for annulment for fraud.[8] It was precisely for this reason that the appellate division refused an annulment in *Shonfeld v. Shonfeld*.[9]

The defendant wife in the *Shonfeld* case, after seven years of courtship, during which the plaintiff had repeatedly refused to marry her on the ground that he was not financially able, induced plaintiff to marry by representing to him that she had $6000 to lend him, so he could go into the jewelry business, and $2000 to furnish a home. Shortly after the marriage plaintiff discovered that defendant had no such amount of money. Reversing the judgment of the appellate division denying plaintiff relief, the court of appeals reiterated the *di Lorenzo* rule saying:

> Any fraud is adequate which is 'material, to that degree that, had it not been practiced, the party deceived would not have consented to the marriage' . . ., and is of such a nature as to deceive an ordinarily prudent person. . . .[10]

Shortly after the decision in the *Shonfeld* case a note in the St. John's Law Review contained the following statement: "The prevailing opinion in the *Shonfeld* case once and for all time, repudiates the 'to the very essence of the contract' doctrine as enunciated in the *Fisk* case." [Footnote omitted.] [11] The author of the NOTE was certain that the rule was now settled in New York. The decisions of the courts, however, do not indicate such certainty as to the repudiation of the doctrine.

McGill v. McGill, 99 Misc. 86, 163 N.Y.Supp. 462 (Sup. Ct. 1917); Sobol v. Sobol, 88 Misc. 277, 150 N.Y.Supp. 248 (Sup. Ct. 1914); Robert v. Robert, 87 Misc. 629, 150 N.Y.Supp. 366 (Sup. Ct. 1914).

[8] See Schaeffer v. Schaeffer, 160 App. Div. 48, 144 N.Y.Supp. 774 (Sup. Ct. 1913); Griffin v. Griffin, 122 Misc. 837, 204 N.Y.Supp. 131, *aff'd*, 209 App. Div. 883, 205 N.Y.Supp. 926 (1924); Beckermeister v. Beckermeister, 170 N.Y.Supp. 22 (Sup. Ct. 1918).

[9] 236 App. Div. 271, 258 N.Y.Supp. 338 (1932), *rev'd*, 260 N.Y. 477, 184 N.E. 60 (1933).

[10] Shonfeld v. Shonfeld, 260 N.Y. 477, 479–80, 184 N.E. 60, 61.

[11] 7 ST. JOHN'S L. REV. 306 (1933).

In most cases the courts purported to follow the *Shonfeld* rule.[12] In some of those cases, although the *Shonfeld* case was cited, the fraud went to the essence of the contract.[13] Annulments were denied in other cases because the representations were not ones that would deceive an ordinarily prudent person.[14] However, several times the courts refused annulments on facts which logically should fit into the broad rule of the *Shonfeld* case.[15] Thus in *Cervone v. Cervone* [16] the supreme court specifically stated that the rule of the *Fisk* case was still the settled law.

It seems that the *Shonfeld* case, by reiterating and applying the rule laid down in *di Lorenzo,* should have settled the general rule concerning annulments for fraud. However, the court of appeals, in 1952, narrowed the *di Lorenzo* and *Shonfeld* rule in *Woronzoff-Daschkoff v. Woronzoff-Daschkoff*.[17] The plaintiff in that case was a disillusioned wife who married an impoverished nobleman. Prior to the marriage the defendant husband represented to the plaintiff, a woman of great wealth, that he had never taken money from a woman, and that after the marriage he would get a job. He also represented that he loved her. Actually, the defendant was a cad. He had accepted money from his former wife as a price for a divorce; his marriage to the plaintiff was but part of a conspiracy with his brother whereby the defendant was to court and marry the plaintiff in order to secure her wealth. Plaintiff's complaint was dismissed and the court stated the rule as follows:

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[12] See Kronman v. Kronman, 247 App. Div. 186, 286 N.Y.Supp. 627 (Sup. Ct. 1936); Rosano v. Rosano, 94 N.Y.S.2d 717 (Sup. Ct. 1950); Waff v. Waff, 189 Misc. 372, 71 N.Y.S.2d 775 (Sup. Ct. 1947); Siecht v. Siecht, 41 N.Y.S.2d 393 (Sup. Ct. 1943); Ryan v. Ryan, 156 Misc. 251, 281 N.Y.Supp. 709 (Sup. Ct. 1935).

[13] See Thurber v. Thurber, 186 Misc. 1022, 63 N.Y.S.2d 401 (Sup. Ct. 1946); Williams v. Williams, 11 N.Y.S.2d 611 (Sup. Ct. 1939); Licato v. Licato, 164 Misc. 105, 298 N.Y.Supp. 768 (Sup. Ct. 1937).

[14] See Pawloski v. Pawolski, 65 N.Y.S.2d 413 (Sup. Ct. 1946); Girshick v. Girshick, 44 N.Y.S.2d 432 (Sup. Ct. 1943).

[15] See Washburn v. Washburn, 62 N.Y.S.2d 569 (Sup. Ct. 1946); Smith v. Smith, 44 N.Y.S.2d 826 (Sup. Ct. 1943); Donovan v. Donovan, 147 Misc. 134, 263 N.Y.Supp. 336 (Sup. Ct. 1933).

[16] 155 Misc. 543, 280 N.Y.Supp. 159 (Sup. Ct. 1935). The referee in this case, J. M. Tierney, was also the referee in the *Shonfeld* case in which he was reversed by the court of appeals.

[17] 303 N.Y. 506, 104 N.E.2d 877 (1952).

> But this is a suit to annul a marriage for fraud, and, while we have, for better or worse retreated (di Lorenzo v. di Lorenzo, 174 N.Y. 467; Shonfeld v. Shonfeld, 260 N.Y. 477, 481), from the old idea that marriages can be voided only for frauds going to the essentials of marriage, that is, consortium and cohabitation, it is, nonetheless, still the law in New York that annulments are decreed, not for any and every kind of fraud (Mirizio v. Mirizio, 242 N.Y. 74, 80; Svenson v. Svenson, 178 N.Y. 54, 59), but for fraud as to matters 'vital' to the marriage relationship only (Lapides v. Lapides, 254 N.Y. 73, 80).[18]

The fraud perpetrated on the plaintiff in the *Woronzoff-Daschkoff* case was such that it should have satisfied the *Shonfeld* rule. Professed love by another is almost always a material element in inducing consent to a marriage. It is evident that though *Woronzoff-Daschkoff* did not purport to overrule the *di Lorenzo* or the *Shonfeld* case, it narrowed the scope of the rule laid down in those cases.

Since the *Woronzoff-Daschkoff* case there have been only three cases decided in New York of which it can be said that they stated the narrower version of the rule as enunciated in the *Woronzoff-Daschkoff* case while denying annulments.[19]

The first such case is *Mark v. Mark,*[20] decided by the appellate division in 1954. Plaintiff wife and defendant were married in 1950. They lived with plaintiff's parents in New York until 1953, when plaintiff left defendant and moved to Albany. Plaintiff alleged that prior to her marriage to defendant he represented to her that he intended to provide a home for her and raise a family. In reliance upon these promises, which plaintiff contends were fraudulently made, plaintiff married defendant. Special term in Albany County denied the application and dismissed the complaint.

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[18] *Id.* at 511, 104 N.E.2d at 880. The word "vital" used in this passage came from the case of Lapides v. Lapides, 254 N.Y. 73, 171 N.E. 911 (1930). Plaintiff there contended that his wife fraudently concealed the fact that she was an epileptic. In the opinion by Judge Crane, the court said, "The fraud which may dissolve the marriage must relate to something vital." (254 N.Y. at 73, 171 N.E. at 913). The court denied the annulment in *Lapides,* but it did so because there was no proof that the defendant had epilepsy prior to the marriage.

[19] *Cf.* Tuchsher v. Tuchsher, 16 Misc. 2d 1, 184 N.Y.S.2d 131 (Sup. Ct. 1959), in which the court stated the *Woronzoff-Daschkoff* rule and granted an annulment on facts similar to those of the *Shonfeld* case.

[20] 283 App. Div. 1136, 131 N.Y.S.2d 513 (1954).

The appellate division, in affirming the lower court, said that while there is no statutory definition of fraud sufficient to annul a marriage, "Annulments are not decreed for any and every kind of fraud but only for such fraud as has to do with matters 'vital' to the marriage relationship."[21] The opinion, after citing the *Woronzoff-Daschkoff* case, said that the court below found that plaintiff should have discovered the fraud and ceased living with defendant, and that it would not upset this determination. Hence, it was not necessary to apply the *Woronzoff-Daschkoff* rule to reach the result which the court arrived at in *Mark v. Mark.*

Baxter v. Baxter[22] is the second case that refers to the "vital theory" in denying an annulment. In that case plaintiff, age thirty-three, claimed the defendant wife, age sixty, fraudulently concealed her "bad habits" from plaintiff before he married her. The bad habits were face lifting operations and other operations aimed as rejuvenation. Quoting from *Lapides v. Lapides*[23] the court said: "Mere non-disclosure as to birth, social position, fortune, good health and temperament cannot vitiate the marriage contract."[24] The court concluded its discussion on what kind of fraud is sufficient ground for an annulment by saying, "The burden of proof upon a plaintiff in such an action demands much more than merely asserting one has been defrauded. It demands convincing proof of concealment of matters vital to the marital relationship.''[25] An annulment was denied, but the court relied more on the fact that there was not ''other satisfactory evidence of the facts,''[26] as required.

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[21] *Id.* at 1136, 131 N.Y.S.2d at 514.

[22] 11 Misc. 2d 69, 169 N.Y.S.2d 871 (Sup. Ct. 1957).

[23] 254 N.Y. 73, 171 N.E. 911 (1930).

[24] 11 Misc. 2d at 71, 169 N.Y.S.2d at 874.

The third case that set out the rule of the *Woronzoff-Daschkoff* case and denied an annulment is *Frost v. Frost.*[27] Prior to the marriage of the plaintiff wife to the defendant, plaintiff alleged that defendant represented he believed in planned parenthood, and would practice such after marriage. Subsequent to their marriage defendant told plaintiff he never believed in planned parenthood and actually desired to raise a family of five or six children, to be born as quickly as possible after the parties' marriage. An annulment was denied and the court said, citing the *Woronzoff-Daschkoff* case, that not every fraud is ground for annulment. However, the denial was based on the rule that parties to a marriage cannot modify the obligations of marriage as they are fixed by law, as set down in *Mirizio v. Mirizio.*[28]

At best these three cases are weak examples to support the proposition that the fraud must concern matters vital to the marriage relationship. However, they are the only cases where the lower courts have denied an annulment while paying lip service to the rule.

In one other case, *Vanderhorst v. Vanderhorst,*[29] the appellate division, in affirming an order granting defendant's motion to open a default against him for an annulment for fraud, reiterated the rule of *Woronzoff-Daschkoff*. Plaintiff wife brought suit for an annulment on the grounds that defendant concealed from her his three previous marriages and his ill health and falsely represented his true name. Upon defendant's default plaintiff was found entitled to an annulment. Prior to the entering of judgment defendant brought on this motion to open the default and interpose an answer. The court in a general discussion of fraud in marriage contracts said, ''Courts will not set aside a contract of marriage on the ground of fraud unless there be clear and convincing proof that there is fraud and that it is vital to the marriage relationship,''[30] citing both the *Woronzoff-Daschkoff* case and *Lapides v. Lapides.* Since the court spoke of fraud merely by way of dictum, this case also cannot be pointed to as evidence that fraud in New York must relate to matters ''vital'' to the marriage relationship.

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[25] *Ibid.*

[26] N. Y. CIV. PRAC. ACT § 1143.

[27] 15 Misc. 2d 104, 181 N.Y.S. 2d 562 (Sup. Ct. 1958).

[28] 242 N.Y. 74, 150 N.E. 605 (1926).

[29] 282 App. Div. 312, 123 N.Y.S. 2d 115 (1953).

In the years since the *Woronzoff-Daschkoff* case the court of appeals has not had to decide a case in which it could further interpret the rule.[31] Probably for this reason the courts in New York, for the most part, ignored the ''vital theory'' and applied the rule of the *di Lorenzo* and *Shonfeld* cases. A look at a few cases will serve to illustrate what the majority of the courts thought the effect of the *Woronzoff-Daschkoff* case was on the fraud rule in New York.

Fraud concerning prior incontinence was held to be sufficient grounds for an annulment in *Gambacorta v. Gambacorta.*[32] Prior to the marriage defendant wife told plaintiff that she had received a divorce from her previous husband on the grounds of his extreme cruelty. Subsequent to the marriage plaintiff discovered that defendant had been divorced by her first husband in New York for adultery. The court in discussing the fraud never considered whether it concerned matters ''vital'' to the marriage. The judge ignored this requirement completely saying: ''I am satisfied that plaintiff would not have married defendant had he known she was divorced by her prior husband for adultery."[33] The court then granted plaintiff's annulment, thus applying the test established by the *Shonfeld* case.

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[30] *Id.* at 314, 123 N.Y.S. 2d at 117.

[31] The only case which has reached the court of appeals concerning annulment for fraud in the last seven years is Brillis v. Brillis, 4 N.Y. 2d 125, 149 N.E. 2d 510, 173 N.Y.S. 2d 3 (1958). The fraud in that case was defendant's false representation that he would enter into a religious ceremony after a civil marriage. The court cited from the authorities holding such fraud was sufficient to satisfy the statute, and did not cite either the *Shonfeld* or *Woronzoff-Daschkoff* case.

[32] 136 N.Y.S. 2d 258 (Sup. Ct. 1954).

Again in *Ciulla v. Ciulla*[34] a past meretricious life was held sufficient to satisfy the statute allowing annulments for fraud. Plaintiff wife brought an action against defendant and he counterclaimed alleging fraud in that plaintiff had entered into a marriage, prior to her marriage with defendant, without obtaining a divorce from the first husband. Thus, she had lived with her second husband illicitly. Not knowing that fact defendant married her. Plaintiff moved to dismiss the counterclaim, on the grounds it failed to state facts sufficient to constitute a cause of action. In denying plaintiff's motion the court said:

> In the instant case it cannot be said as a matter of law that plaintiff's representation that she was validly married to Gehr [the second husband], when in fact she was merely living with him illicitly, would not have been a material inducement to the marriage herein.[35]

No heed was paid to whether the fraud concerned vital matters, but the court merely applied the broad rule of the *Shonfeld* case.

Probably the most radical decision as a result of the rule established by the *di Lorenzo* and *Shonfeld* cases occurred in the case of *Madden v. Madden*.[36] Defendant there represented to plaintiff wife, among other things, that he would not lie to her or keep any secrets from her. Less than two months after the marriage the plaintiff discovered that defendant had put a chattel mortgage on the household furniture given the couple by plaintiff's parents, as security for a loan. The court granted the annulment saying, "This marriage founded in fraud and concealment cannot be of any happiness to the parties or of any service to the State."[37]

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[33] *Id.* at 259.

[34] 136 N.Y.S. 2d 176 (Sup. Ct. 1954).

[35] *Id.* at 177.

[36] 204 Misc. 170, 125 N.Y.S. 2d 384 (Sup. Ct. 1953).

[37] *Id.* at 171, 125 N.Y.S. 2d at 385.

The court in this case, not only did not inquire whether the fraud concerned matters "vital" to the marriage, but did not even consider whether the fraud induced plaintiff to marry, the chief requirement of the *Shonfeld* rule.

Earlier this year an annulment was granted in *Shaffer v. Shaffer*[38] to a wife on the grounds of fraud, four years after the marriage which had produced two children. The husband brought an action for separation and the wife counterclaimed for annulment. The plaintiff had falsely represented that he had never been married before. Defendant alleged that in reliance upon this representation she married plaintiff. An annulment was granted, the court stating:

> Reluctant though I may be to dissolve a marriage of some four years duration of which two children have been born, I have nothing before me which in any way contradicts this young woman's claim of reliance on the plaintiff's fraudulent representations of an essential element to her consent to marry him, ...[39]

This is the ordinary application of the *di Lorenzo* and *Shonfeld* rule without mention of the narrower view of the *Woronzoff-Daschkoff* case.

The impact of the *Woronzoff-Daschkoff* case on the requirements for granting an annulment for fraud has been negligible. As stated earlier, the three cases that cited *Woronzoff-Daschkoff* and denied an annulment could have been based on other grounds. The courts in New York, for the most part, still apply the broad rule of the *Shonfeld* case. True they probably still will not recognize false representations of love, on the part of one party for the other, as sufficient fraud for an annulment, but it seems that after seven years, the *Woronzoff-Daschkoff* case will not now be interpreted, by the lower courts, to limit the rule to include only fraud concerning matters vital to the marriage.

The great volume of litigation in New York concerning fraud in the marriage contract is due mainly, it seems, to the fact that the only ground for divorce in this state is adultery.[40] Spouses seeking cancellation of the marriage contract for reasons which would be sufficient grounds for divorce in other jurisdictions are in need of a legal remedy. The dissolution of marriage by an annulment for fraud offers many of the same desirable results, from the view point of the parties concerned, as a divorce and is free of the social stigma associated with adultery. For this reason annulment for fraud has become a common way of nullifying the marriage contract in New York.

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[38] — Misc. 2d —, 185 N.Y.S. 2d 67 (Sup. Ct. 1959).

[39] *Id.* at 68.

Some of the refusals of the courts to follow the broad rule of the *di Lorenzo* and *Shonfeld* cases, may perhaps be explained by the broad scope of discretion permitted a court of equity. In conclusion, it seems safe to say that today we are still groping for that path out of the ''labyrinth of contradictory and chaotic things,''[41] spoken of by Mr. Bishop seventy-five years ago.

HAROLD L. TWISS, JR.

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[40] N.Y. CIV. PRAC. ACT § 1147.

[41] *Supra* note 1.

Collateral Estoppel and the Joint Defendant

An automobile accident involving two cars results in injuries to *A*, the owner-operator of car 1, and to *X* and *Y*, the owner-operator and passenger in car 2. Thereafter, *Y*, the passenger in car 2 brings an action to recover damages for his personal injuries against *A* and *X* as joint defendants. No cross-claims are asserted as between *A* and *X*. *Y* is successful, recovering a judgment against both defendants and no appeal is taken. Subsequently, *A* brings an action against *X* to recover for personal injuries or damages to his car. At this point, *A* is met with the defense of res judicata.[1] *X* contends that as the jury in the first action found the codefendants therein negligent and jointly responsible, the plaintiff in this action may not now successfully maintain an action against him to recover for damages arising out of the same accident. Thus the issue of the conclusiveness *inter se* of a prior determination as to liability of joint defendants is raised.

The determination of the issue presented by the hypothetical case would seem to be of more than academic interest to the active practitioner. It is also clear that the question will arise in analogous factual situations embracing fields of law other than negligence. Likewise, the broader question of the conclusiveness of judgments upon parties-litigant in general is necessarily involved in a discussion of estoppel as it applies to joint defendants. The purpose of this comment is to review recent decisions precluding joint defendants in situations similar to the example given and to consider the propriety of these holdings in light of the growth of the doctrine of collateral estoppel in New York State.

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[1] The term res judicata does not adequately describe the nature of the defendant's defense. More precisely his defense is that there exists a collateral estoppel as to the issue of negligence which it is maintained was conclusively determined in the prior action. Black, in his treatise on the law of judgments, discusses the two typical cases in which a judgment may be offered as evidence, his first example being the one applicable to the hypothetical case. "For first, it may be brought forward as evidence of some one particular point which is involved in a different litigation between the same parties. Or secondly, it may be offered as a bar to the whole action, on the ground that it is a determination, previously had between the parties of the same controversy." 2 BLACK, JUDGMENTS § 506 (1891).

Until recently, the rule that parties-defendant to an action are not bound by the judgment therein in subsequent litigation between them unless they were adversaries in the action in which the judgment was entered, had been considered settled law in New York State.[2] The theory of this rule, and the decisions following it, is that the prior decision merely adjudicates the rights of the plaintiff as against each defendant, and leaves unadjudicated the rights of the defendants as between themselves.[3] The statement of the above-mentioned rule and the theory behind it would seem to answer the question posed by the hypothetical case, and it no doubt would today if it were not for the appearance upon the scene of *Israel v. Wood Dolson Co.,*[4] decided by the court of appeals in 1956.

In that case, an action was brought by Israel against Wood Dolson for breach of contract, and against one Gross for wrongful inducement of the breach. Israel alleged that under a written contract with Wood Dolson he was to be entitled to a commission in the event that a buyer introduced by him purchased certain premises. He also alleged the introduction of Gross, the sale to Gross or his nominees, that he was entitled to a commission and that the failure of Wood Dolson to pay constituted a breach of the contract.

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[2] Glaser v. Huette, 232 App. Div. 119, 249 N.Y.Supp. 374, *aff'd mem.,* 256 N.Y. 686, 177 N.E. 193 (1931).

[3] Self v. International Ry., 224 App. Div. 238, 230 N.Y.Supp. 34 (1928).

[4] Israel v. Wood Dolson Co., 1 N.Y. 2d 116, 134 N.E. 2d 97, 151 N.Y.S. 2d 1 (1956).

At the opening of the trial, Israel successfully moved to sever the two causes of action, whereupon he proceeded against Wood Dolson alone to recover for the breach of contract. Israel was unsuccessful in this action and thereafter Gross amended his answer to plead the affirmative defense of res judicata and moved for summary judgment, on the ground that he could not be found to have induced a breach when a court of competent jurisdiction had found that no breach had occurred as between Israel and Wood Dolson. Supreme court, special term, denied the motion; the appellate division reversed;[5] and the court of appeals unanimously affirmed in an opinion written by Chief Judge Conway.[6]

The factual situation in the *Wood Dolson*[7] case would seem to render it distinguishable from and inapplicable to the joint defendant situation. Though the defendants were sued jointly originally, the causes were severed and tried separately. Of greater importance, the wrongs allegedly committed by the two defendants were not of the same nature as those charged when individuals are sued jointly in a negligence action. Here, one defendant was sued for breaching a contract, while the other was charged with inducing that breach. Therefore, if the causes had been tried together and a verdict had been rendered in favor of Wood Dolson, but against Gross, it is submitted that such a verdict would have been set aside as inconsistent as a matter of law.[8] It would be inconsistent to hold one liable for inducing a breach which by the same verdict was held not to have occurred. If, however, Wood Dolson had been found liable for breach of the contract, Gross could have been exonerated in the then necessary additional litigation. The inquiry is, therefore, whether the possibility of inconsistency present in the *Wood Dolson* case is inherent also in situations such as the hypothetical case set out initially.

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[5] 285 App. Div. 719, 140 N.Y.S. 2d 663 (1955).

[6] Israel v. Wood Dolson, *supra* note 4.

[7] *Ibid.*

[8] See, Pangburn v. Buick Motor Co., 211 N.Y. 228, 105 N.E. 423 (1914).

If such a possibility is in fact found to exist, it should not, it is submitted, be controlling in joint defendant situations.

How then has the *Wood Dolson* decision been found persuasive authority in subsequent joint defendant litigations? The answer lies in the broad dicta of that opinion which have been seized upon by at least three judges, in recently decided cases,[9] to preclude former defendants on the basis of results in earlier law suits in which they had not been adversary parties. These cases and the above-mentioned dicta should be considered in the light of the case of *Glaser v. Huette.*[10]

The parties in the *Glaser* case had been held liable for negligent operation of their automobiles in an earlier action in which all were defendants. Thereafter, Glaser sued Huette and one Austin to recover for personal injuries and damage to his car. The defendants' motion for leave to amend their answer to plead the defense of res judicata was denied. The appellate division, one justice dissenting, summarily disposed of the appeal by saying:

> We think that since the parties now here were not adversaries in the former suits but codefendants wherein no duty existed to contest the issue of negligence as betweeen them and no pleadings existed between them, the decisions there settled nothing as to the liability of the codefendants to each other. Therefore, the plea of res adjudicata was not available to this defendant.[11]

Justice Martin in his dissent [12] maintained:

> In the cases in the Municipal Court the precise matters in issue were the negligence of this plaintiff and this defendant, and those issues were necessarily determined.

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[9] Moran v. Lehman, 7 Misc. 2d 994, 157 N.Y.S. 2d 684 (N.Y. Munic. Ct. 1956); James v. Saul, 17 Misc. 2d 371, 184 N.Y.S. 2d 934 (N.Y. Munic. Ct. 1958); Light v. Quinn, 17 Misc. 2d 1083, 189 N.Y.S. 2d 94 (Broome County Ct. 1959); Moyle v. Cronin, 18 Misc. 2d 465, 189 N.Y.S. 2d 96 (Broome County Ct. 1959).

[10] *Supra* note 2.

[11] 232 App. Div. 119, 249 N.Y.Supp. 374 (1931).

[12] *Id.* at 121, 249 N.Y.Supp. at 376.

> The jury there decided that all the parties hereto were negligent. They had ample opportunity there to submit evidence and to definitely place the responsibility for the accident. The codefendants therein, having litigated the question of negligence, and having been found negligent, the judgment entered in the Municipal Court is a final adjudication on the issue of negligence and the plaintiff is not now in a position to relitigate that question.

He also argued that § 211-a of the CIVIL PRACTICE ACT, by allowing contribution between joint tort feasors, confirms the proposition that the prior judgment was res judicata.[13] It would seem, however, that the answer to both of his arguments is that such a judgment should be res judicata only as to the liability of the joint defendants to the plaintiff and not as to their liability *inter se.*

The court of appeals affirmed in a memorandum decision wherein a negative answer was given to the certified question—"Is the defense of res adjudicata set forth in the proposed amended answer a valid defense to the cause of action alleged in the complaint?"[14] This adoption by the court of appeals of the rule as enunciated by the appellate division has never been expressly overruled.[15]

The argument that the *Glaser* case is no longer the law in New York State is based upon the following language taken from the *Wood Dolson* opinion:[16]

> Where a full opportunity has been afforded to a party to the prior action and he has failed to prove his freedom from liability or to establish liability or culpability on the part of another, there is no reason for permitting him to retry these issues. . . .
>
> It will be seen, therefore, that the fact that a party has not had his day in court on an issue *as against a particular litigant* is not decisive in determining whether the defense of *res judicata* is applicable.

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[13] *Ibid.*

[14] Glaser v. Huette, 256 N.Y. 686, 177 N.E. 193 (1931).

[15] Singer v. Banzer, 8 Misc. 2d 3, 167 N.Y.S. 2d 482 (N.Y. City Ct. 1957).

[16] Israel v. Wood Dolson Co., 1 N.Y. 2d 116, 119–120; 134 N.E. 2d 97, 99–100; 151 N.Y.S. 2d 1, 4–5 (1956).

> . . . The unilateral character of the estoppel in such cases is warranted by the policy of the doctrine of *res judicata*—that there be an end to litigation.
>
> . . . in determining the applicability of the doctrine of *res judicata* as a defense, the test to be applied is that of 'identity of issues.'

These statements were quoted with approval in *Moran v. Lehman*[17] where it was held that *Glaser v. Huette* had been overruled.[18] The *Moran* decision involved a motion to plead the defense of res judicata, and for summary judgment, on the ground that an earlier action, arising out of the same accident and in which the parties were defendants, had ended in a verdict against Moran and in favor of the defendants in the instant case. The plaintiff (Moran) relied upon *Glaser v. Huette,* but the court, reasoning that, as the earlier action turned on the identical issue of negligence and as Moran had had a full opportunity to establish his freedom from liability, held that he would not be permitted to retry the issue of negligence. The court also mentioned that its determination would be helpful in ameliorating the overburdened negligence calendar.[19] Such a result is not to be quarreled with if the precluded party has in fact "had his day in court."

James v. Saul,[20] decided by the same court as *Moran v. Lehman* though written by a different justice, is another recent case in which a former joint defendant is held barred by a former judgment. The factual situation in this instance is quite similar to that of the example given in the introduction to this comment. Again, the plaintiff relied upon *Glaser v. Huette* and the court denied it effect by saying:

> While it is true that Glaser v. Huette has not been expressly overruled (see Singer v. Banzer, 8 Misc. 2d 3, 167 N.Y.S. 2d 482), the effect of the recent opinions is to limit its holding to a case where justice is best served by refusing to apply the rule of res adjudicata, as where the party

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[17] *Supra* note 9.

[18] *Id.* at 996, 157 N.Y.S. 2d at 686.

[19] *Id.* at 997, 157 N.Y.S. 2d at 687.

[20] 17 Misc. 2d 371, 184 N.Y.S. 2d 934.

> against whom it is sought to be used has not had his day in court and has not had full opportunity to litigate the issue of his responsibility.[21]

At the time of this writing, there are but two additional decisions [22] since *Wood Dolson* which hold a prior determination conclusive as to joint defendants. These were handed down by the Broome County Court in July of 1959. In both of these cases, *Israel v. Wood Dolson* and the "weight of recent authority" are relied upon. In *Light v. Quinn,* the first of the two mentioned cases, the parties had been joint defendants in an earlier action in which Quinn had been found negligent and Light free from responsibility. The question of the availability of the plea of res judicata arose in connection with Quinn's counterclaim against Light. The court held the former judgment res judicata of the subject matter set forth in the counterclaim.[23] The effect of this holding is to allow the plea to be used defensively while presumably the plaintiff will be put to his proof as to the allegations of his complaint. If, however, the reasoning behind the preclusion of the defendant on his counterclaim is followed to a logical conclusion, the plaintiff should be allowed to affirmatively plead the prior judgment in subsequent litigation as conclusive of the defendant's liability.

The other Broome County Court decision concerned the availability of the plea in an instance in which the parties had been held liable in an earlier litigation wherein they had been joint defendants. Again, the court allowed the defense of res judicata to stand,[24] citing substantially the same authority as it did in *Light v. Quinn.*

Research discloses but one reported case subsequent to *Glaser v. Huette* and prior to *Israel v. Wood Dolson* in which the defense of res judicata is held available to a former joint defendant.[25] In comparison, however, there are but two decisions during the same period which follow and rely upon *Glaser* as controlling authority.[26] The paucity of decisions may possibly be attributable to the fact that the law in this area has been presumed to be well-settled. As the court said in *Boyne v. Somac Motors:*

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[21] *Id.* at 372–373, 184 N.Y.S. 2d at 936.

[22] Light v. Quinn, 17 Misc. 2d 1083, 189 N.Y.S. 2d 94 (Broome County Ct. 1959); Moyle v. Cronin, 18 Misc. 2d 465, 189 N.Y.S. 2d 96 (Broome County Ct. 1959).

[23] Light v. Quinn, 17 Misc. 2d 1083, 1084; 189 N.Y.S. 2d 94, 96 (Broome County Ct. 1959).

[24] Moyle v. Cronin, 18 Misc. 2d 465, 189 N.Y.S. 2d 96 (Broome County Ct. 1959).

> . . . It is well established that in an action brought by a third party in which the plaintiff and defendant were parties defendant the judgment is not res adjudicata unless the parties were adversaries and disposed of issues between themselves on pleadings raising such issues.[27]

The tenor of the recently decided cases, previously alluded to,[28] evidences the possibility of an additional exception to the mutuality of estoppel requirement in New York State. *Elder v. New York & Penn. Motor Express,*[29] wherein the question was whether Elder could affirmatively plead a favorable judgment obtained by United States Trucking Corporation in a prior action against Penn. Motor Express, contains an excellent elaboration of the mutuality rule. There it is written:

> When issues on the same subject-matter have once been settled by litigation between the same parties or their privies, before a court of competent jurisdiction, and the estoppel of the judgment is mutual, that is to say that the other party would be bound if the original decision had been to the contrary, then in the interest of reasonable finality of litigation that decision should be conclusive. A well-recognized 'apparent exception to this rule of mutuality' exists where liability for the fault of an agent or servant or indemnitee is asserted against a principal, master or indemnitor. In such case where there has been a prior judgment in favor of the agent, servant or indemnitee rendered in an action brought against him

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[25] Bennett v. Mitchell, 151 N.Y.S. 2d 574 (Sup. Ct. 1956).

[26] Boyne v. Somac Motors, 91 N.Y.S. 2d 634 (Sup. Ct. 1949); Corey v. Central Taxi, 199 Misc. 403, 106 N.Y.S. 2d 457 (Sup. Ct. 1951).

[27] 91 N.Y.S. 2d at 635.

[28] *Supra* note 9.

[29] 284 N.Y. 350, 31 N.E. 2d 188 (1940).

> by the same plaintiff, such judgment destroys the basis of liability asserted against the principal, master or indemnitor and constitutes a complete defense to the action thereafter brought against him.[30]

Good Health Dairy Prods. Corp. v. Emery[31] involved one of the above-mentioned "apparent exceptions." A judgment dismissing the complaint of an injured person against the driver of an automobile was therein held to bar recovery in a subsequent action against the owner.[32] Such a holding was necessary in order to avoid an anomaly in the indemnitor-indemnitee relationship, since the indemnitor (driver) had been exonerated. It is to prevent similar possible anomalous results that dismissal of an action against an agent or servant is held to bar recovery against the principal or master.[33] The Restatement states the dilemma well and briefly:

> If a judgment against the claimant in an action against the indemnitor were not res judicata in a subsequent action against the indemnitee, either the indemnitee would be required to pay without the possibility of indemnity against the indemnitor, or the indemnitor would be required to make indemnity for a claim which, in an action by the claimant against him, had been found not to exist.[34]

Considering, then, the *Wood Dolson* decision in the light of the above-mentioned deviations from the mutuality requirement, it may be said that that decision was merely an extension of the theory of those cases. It is noteworthy that the court in the *Wood Dolson* opinion stated:

> Our holding is not to be treated as adding another general class of cases to the list of 'exceptions' to the rule requiring mutuality of estoppel. It is merely the an-

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[30] *Id.* at 352, 31 N.E. 2d at 189.

[31] 275 N.Y. 14, 9 N.E. 2d 758 (1937). See also Annot. 112 A.L.R. 401 (1938).

[32] *Id.* at 19, 9 N.E. 2d at 760.

[33] Eissing Chemical Co. v. People's Nat. Bank of Brooklyn, 205 App. Div. 89, 199 N.Y.Supp. 432, *aff'd,* 237 N.Y. 532, 143 N.E. 731 (1923); Pangburn v. Buick Motor Co. 211 N.Y. 228, 105 N.E. 423 (1914).

[34] RESTATEMENT, JUDGMENTS § 96, comment a (1942).

> nouncement of the underlying principle which is found in the cases classed as 'exceptions' to the mutuality rule.[35]

This statement is conspicuously absent from the recent decisions precluding joint defendants.[36] Employed instead were more general statements such as the reference to the "identity of issues" test.[37] *Glaser v. Huette* is not mentioned by the appellate division or the court of appeals in their opinions in the *Wood Dolson* case, nor is it cited in the briefs of counsel. It is submitted, therefore, that the holding in *Singer v. Banzer,*[38] while in the minority of recently decided cases, is a proper analysis of the problem under consideration. There, recognizing the many liberal views expressed on the subject in recent years; and while in disagreement with its result, the court held itself bound by *Glaser v. Huette* "until some appellate court has *expressly* decided that it has been overruled by the reasoning of the *Wood Dolson* case." (Italics as in original.)[39]

Apart from the obviously distinguishable factual situations in *Glaser* and *Wood Dolson,* there is a fundamental difference in the rationale of the two. While *Wood Dolson* was needed to protect against possible inconsistent verdicts, *Glaser* was necessary to protect a party from preclusion in an instance where he had not "had his day in court." Herein lies the fallacy of the "identity of issues" test. It is argued that just as the basic issue in *Wood Dolson* was the breach of a contract; so in a *Glaser* situation, such issue is the negligence of the parties defendant. However, in the latter case, the issue in the first law suit is not in fact identical to the issue in the second. In the joint defendant situation the liability of the defendants to a plaintiff is, in the absence of cross-complaint, the only issue. Whereas, in the subsequent suit, the inquiry is as to the liability of the defendants to each other.

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[35] 1 N.Y. 2d at 120, 134 N.E. 2d at 99, 151 N.Y.S. 2d at 5.

[36] *Supra* note 9.

[37] Moran v. Lehman, 7 Misc. 2d 994, 997; 157 N.Y.S. 2d 684, 687 (1956).

[38] 8 Misc. 2d 3, 167 N.Y.S. 2d 482 (1957).

[39] *Id.* at 5, 167 N.Y.S. 2d at 484.

The rule that parties defendant, to be bound by a judgment, must be adversary is based upon the feeling that they should not be concluded by a judgment unless they so choose by contesting an issue *inter se,* either on pleadings between themselves and the plaintiffs or upon cross pleadings between themselves.[40] The possibility that two judgments may appear on their face to be inconsistent should not be persuasive in this instance. As was said in *St. John v. Fowler:*

> The results of the two actions on their face are inconsistent. The practice and proceedings, however, are in perfect harmony with the proper administration of justice. The law can only make its judgments after the facts are determined and the facts are dependent upon human agencies for their proof. It is not at all unusual for two cases arising out of the same transaction to result in different judgments because there is lacking in the one that element of proof which exists in the other.[41]

There may be, then, newly discovered evidence which would change the result of joint defendant litigation. Another consideration is the fact that the original claim may be minor in nature. A judgment in favor of a third party for damages to his car should not, it seems, be conclusive as to parties defendant and their liability *inter se.* One of them may be crippled for life. To hold such a person precluded on the basis of the determination in the comparatively unimportant prior litigation appears grossly unfair. So also, the experience, preparation and skill of counsel in the two cases may differ greatly. Finally, the nature of a jury verdict must be scrutinized. Though not mentioned, juries today know full well that insurance is generally involved in the type of litigation under study. It may be possible, therefore, in certain instances, that joint defendants will be held liable to a third person as both are believed to be insured.

Those favoring the holdings of the recently decided cases [42] maintain that as a practical matter the parties defendant in the original actions were adversaries. This contention is based upon the natural desire of such defendants to hold the other party liable while freeing themselves from responsibility. Also, it is said that the parties defendant, having had an opportunity to contest their liability *inter se*, should not at a later date be allowed to do so.[43] The inquiry then is whether the failure to take the opportunity should work to the detriment of the defendant who in the exercise of discretion chooses not to cross-claim. If so, the right of choice as a practical matter ceases to exist.

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[40] Self v. International Ry., *supra* note 3; See also, Erie R.R. v. Buffalo and Lackawana Traction Co., 220 App. Div. 520, 221 N.Y.Supp. 680, *aff'd,* 246 N.Y. 625, 159 N.E. 677 (1927).

[41] 229 N.Y. 270, 275, 128 N.E. 199, 201 (1920).

[42] *Supra* note 9.

While the contentions of those favoring preclusion are not without merit, there are weighty arguments in favor of a rule requiring that parties to an action must be adversaries if they are to be bound by the judgment therein. *Glaser v. Huette* so holds. It would seem unwise, therefore, until that case is expressly overruled, to extend the relaxation of the mutuality of estoppel requirement to the prejudice of joint defendant litigants.

EVERETT C. WEIERMILLER

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[43] Moran v. Lehman, 7 Misc. 2d 994, 997, 157 N.Y.S. 2d 684, 687 (1956).

Disclaimer of Liability for Fraud in Written Agreements

Should a person escape liability for his own fraudulent statements by inserting in a contract a clause to the effect that the other party shall not rely upon them? Most courts throughout this country and in England have replied to this question in the negative.[1] However, recently the New York Court of Appeals in *Cohen v. Cohen*[2] and *Danann Realty Corp. v. Harris*,[3] has answered in the affirmative.

The controversy over the validity and effect of the disclaimer of liability for fraud in written agreements affects the entire commercial world, from the small business dealings between individuals to the large mercantile transactions of corporate enterprise. Written contracts for the rental or sale of real property, contracts for the sale of goods, marital agreements, and other forms of negotiations in writing often contain provisions disclaiming liability for fraud.[4] If such a provision be given effect in a court of justice would it violate public policy and morality or would it be possible for two businessmen dealing at arm's length to agree that one will not rely upon the fraudulent representations of the other? Thus, are presented the two sides of the controversy: on one hand, the prevention of injustice through fraudulent dealings; on the other, the sanctity and certainty of the written contract which eliminates reliance on oral statements as affecting the contractual obligations of the parties.

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[1] Pearson & Son v. Dublin Corp., [1907] A.C. 351; Bridger v. Goldsmith, 143 N.Y. 424, 38 N.E. 458 (1894); Arnold v. National Aniline & Chem. Co., 20 F.2d 364 (2d Cir. 1927); Ganley Bros. v. Butler Bros. Bldg. Co., 170 Minn. 373, 212 N.W. 602 (1927); Lufty v. Roper & Sons Motor Co., 57 Ariz. 495, 115 P.2d 161 (1941); Bates v. Southgate, 308 Mass. 170, 31 N.E. 2d 551 (1941).

[2] 3 N.Y. 2d 813, 144 N.E. 2d 649, 166 N.Y.S. 2d 10 (1957) (Fuld and Froessel, J.J., dissenting).

[3] 5 N.Y. 2d 317, 157 N.E. 2d 597, 184 N.Y.S. 2d 599 (1959) (Fuld, J., dissenting).

[4] The typical disclaimer clause is general in its terms, and does not usually specify the particular representations from which a party seeks to escape liability. A good example of such a clause is found in 3 Am. Jur. Legal Forms Ann. 599 (1953), Form No. 3:1016: "This instrument embodies the whole agreement of the parties. There are no promises, terms, conditions or obligations referring to the subject-matter, other than contained herein."

When a person disclaims liability for fraud in a written agreement, what does the word "fraud" cover? "Fraud" is a generic term, including many forms of tortious conduct,[5] but the form which affects a written contract containing a disclaimer clause is of two types: 1) fraud in the factum and 2) fraud in the inducement. The former concerns the making or execution of the instrument, and arises from circumstances going to the question as to whether the contract in fact ever had any legal existence.[6] The latter consists of a misrepresentation as to a material fact upon which one relies, and is thereby induced to enter into the contract to his injury.[7] The disclaimer clause usually pertains to fraud in the inducement, *i.e.,* misrepresentations made before the contract is put in writing, which induce another to enter into the written agreement.

The cases in which the validity and effect of the disclaimer clause have been in issue, were principally actions for deceit or rescission based on fraud in the inducement of the contract. In these actions, the theory of liability is the falsity of statements made outside the written contract, thus distinguishing these actions from those in which the action was founded on the provisions of the written contract itself, *e.g.,* actions for breach of contract or warranty.[8] This distinction is important because the rules of evidence in actions for deceit or for rescission of a contract induced by fraud are quite different from those in breach of contract or warranty actions. In the former, proof of oral representations inducing a person to enter into the contract are generally admissible and the parol evidence rule is not applicable,[9] whereas, in the latter, the parol evidence rule prevents proof of such oral representations to alter, modify or change the written provisions of the contract.[10]

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[5] Stapelton v. Holt, 207 Okl. 443, 250 P.2d 451 (1952).

[6] M. & J. Finance Corp. v. Rinehardt, 216 N.C. 380, 5 S.E.2d 138 (1939).

[7] Lovato v. Catron, 20 N.M. 168, 148 P. 490 (1915).

[8] Lumbrazzo v. Woodruff, 256 N.Y. 92, 175 N.E. 525 (1931) (breach of warranty action); Lasky v. Rubel Corp., 303 N.Y. 69, 100 N.E. 2d 140 (1951) (breach of contract action).

What effect does the disclaimer clause have on the parol evidence rule in actions for deceit or for rescission of a contract induced by fraud? The written provision excluding reliance by another on oral representations would seem to preclude the other from offering parol evidence as to these representations and his reliance thereon. In order to establish fraud, the plaintiff must show his reliance on the defendant's false statements, and if he is estopped from proving this, he will not succeed in his law suit. The problem of whether the disclaimer clause prevents one from offering parol evidence as to his reliance on oral fraudulent representations is a serious one, which has long perplexed the courts.

The Validity of the Disclaimer Clause

It is an established maxim of the common law that fraud vitiates every agreement which it touches.[11] Guided by this rule, courts have traditionally held that if a party has actually induced another to enter into a contract by means of fraudulent misrepresentations, no language can be devised to shield that party from the consequences of such fraud.[12] In *Bridger v. Goldsmith*,[13] the leading case in New York declaring the invalidity of the disclaimer clause, the underlying reason for the majority rule was thus expressed: "Public policy and morality are both ignored if such an agreement can be given effect in a court of justice."[14] The clause in this case read:

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[9] See Sabo v. Delman, 3 N.Y. 2d 155, 143 N.E. 2d 906, 164 N.Y.S. 2d 714 (1957) (*dictum*). *But cf.* Fogelson v. Rackfay Constr. Co., 300 N.Y. 334, 90 N.E. 2d 881 (1950).

[10] Mitchill v. Lath, 247 N.Y. 377, 160 N.E. 651 (1928).

[11] Pearson & Son v. Dublin Corp., *supra* note 1.

[12] See cases *supra* note 1.

[13] 143 N.Y. 424, 38 N.E. 458 (1894).

> It is expressly understood and agreed between the parties hereto that the said party of the first part has not, in any manner or form, stated, made or represented to the said party of the second part, for the purpose of inducing the sale of the said business or the making of this agreement, any statements or representations verbally or in writing in respect to the said business. . . .[15]

The court declared this provision void and awarded equitable relief to the plaintiff rescinding the written contract for fraud in the inducement.

Courts are reluctant to refuse relief to the deceived party despite his agreement not to rely on the fraudulent representations of another. They have condemned methods by which an individual obtains benefit from his own misconduct,[16] and the disclaimer clause, being such a method, has met with the same judicial disfavor. However, the highest courts of Massachusetts and Texas upheld the validity of the disclaimer clause for a long time before they succumbed to the overwhelming weight of authority.[17]

Prior to 1941, the Supreme Judicial Court of Massachusetts made a distinction between a disclaimer of liability for fraud antecedent to the contract and fraud which entered into the making of the contract.[18] The former was effective but the latter was not.[19] However in *Bates v. Southgate,*[20] the court concluded that this distinction could not be maintained and stated that:

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[14] *Id.* at 428, 38 N.E. at 462.

[15] *Id.* at 426, 38 N.E. at 460.

[16] See Riggs v. Palmer, 115 N.Y. 506, 22 N.E. 188 (1889).

[17] Bates v. Southgate, *supra* note 1; Dallas Farm Mach. Co. v. Reaves, 307 S.W.2d 233 (Texas 1957). The court in both of these cases overruled a long line of decisions upholding the validity of the disclaimer clause.

[18] Colonial Development Corp. v. Bragdon, 219 Mass. 170, 106 N.E. 633 (1914).

[19] *Id.* at 176, 106 N.E. at 639.

[20] 308 Mass. 170, 31 N.E. 2d 551 (1941).

> . . . contracts or clauses attempting to protect a party against the consequences of his own fraud are against public policy and void where fraud inducing the contract was shown, whether that fraud was 'antecedent' to the contract or 'entered into the making' of it.[21]

Texas too has adopted a new policy in respect to the validity of the disclaimer clause. In *Dallas Farm Mach. Co. v. Reaves,*[22] the provision disclaiming liability for fraud was to the effect that the copy of a customer's order for certain equipment constituted the entire contract relating to the sale of the equipment, and that no representations were or are to be made other than those contained in the customer's order. In an action by the seller to recover the balance due on the written contract of sale of a tractor, the court held the disclaimer clause void and gave judgment for the defendant-buyer on his cross-action to rescind the contract induced by fraud.

Until the time of this decision, there were two conflicting lines of authority in Texas: one upholding the validity of the disclaimer clause where fraud in the inducement was claimed,[23] the other declaring the exculpatory provision invalid where fraud in the execution was involved.[24] The Supreme Court of Texas found no justification whatever for this distinction and resolved the conflict by adopting the majority rule. Referring to *Bates v. Southgate,*[25] the court said: "We make the same choice made by the Massachusetts court, and in so doing, we bring the law on the subject in this state in harmony with the great weight of authority. . . ." [26]

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[21] *Id.* at 177, 31 N.E. 2d at 558.

[22] 307 S.W.2d 233 (Texas 1957).

[23] Distributor's Inv. Co. v. Patton, 130 Tex. 449, 110 S.W. 2d 47 (1937); Super-Cold Southwest Co. v. Elkins, 140 Tex. 48, 166 S.W. 2d 97 (1942).

[24] Edward Thompson Co. v. Sawyers, 111 Tex. 374, 234 S.W. 873 (1921); Texas & P. Ry. Co. v. Presley, 137 Tex. 232, 152 S.W. 2d 1105 (1941).

[25] 308 Mass. 170, 31 N.E. 2d 55 (1941).

[26] Dallas Farm Mach. Co. v. Reaves, 307 S.W. 2d at 239. See also, 32 *C.J.S.,* EVIDENCE § 979 a (1942); 23 AM. JUR., FRAUD AND DECEIT § 26

On March 5, 1959, the New York Court of Appeals in *Crowell-Collier Publishing Co. v. Josefowitz,*[27] held that despite a recital in a written agreement which provided: "This Agreement constitutes the entire understanding between the parties, [and] was not induced by any representations, warranties or covenants not herein contained," [28] the plaintiffs were not barred from suing the defendants for fraud in inducing them to make the contract. The exculpatory provision involved in this case is the typical general merger clause which is incorporated into many contracts for the sale of real and personal property. The contract here was for the sale of defendants' business for approximately $3,000,000, but before the contract was executed, the defendant-sellers made false representations to the plaintiff-buyers as to the earnings, profitability and dynamic growth of the business. The defendants argued that the general merger clause was effective to estop the plaintiffs from complaining about the fraudulent representations. The court followed the majority rule and held that the disclaimer clause did not prevent the deceived buyers from showing that they were induced to enter into the contract.[29] This holding is the latest expression of the New York Court of Appeals' disapproval of a policy which would permit a party to a contract to escape liability for his misrepresentations, by inserting a disclaimer clause in the contract.

(1939); 56 A.L.R. 13 (1928); 75 A.L.R. 1041 (1931); 127 A.L.R. 137 (1940); RESTATEMENT, CONTRACTS § 573 (1932); 3 CORBIN, CONTRACTS § 580 (1950); 3 WILLISTON, SALES § 6316 (Rev. Ed. 1948); 3 WILLISTON, CONTRACTS § 811 A. (1936); 9 WIGMORE, EVIDENCE § 2439 (3d ed. 1940).

[27] 5 N.Y. 2d 998, 157 N.E. 2d 730, 184 N.Y.S. 2d 859 (1959).

[28] *Id.* at 999, 157 N.E .2d at 731, 184 N.Y.S. 2d at 860.

[29] Bridger v. Goldsmith, *supra* note 1; Jackson v. State, 210 App. Div. 115, 205 N.Y. Supp. 658 *aff'd,* 241 N.Y. 563, 150 N.E. 556 (1925); Angerosa v. White Co., 248 App. Div. 425, 290 N.Y. Supp. 204, *aff'd,* 275 N.Y. 524, 11 N.E. 2d 325 (1937); Ernst Iron Works v. Duralith Corp., 270 N.Y. 165, 200 N.E. 683 (1936) (*dictum*); Sabo v. Delman, 3 N.Y. 2d 155, 143 N.E. 2d 906, 164 N.Y.S. 2d 714 (1957) (*dictum*); Mosler Holding Corp. v. Bell, 10 Misc. 2d 834, 170 N.Y.S. 2d 159 (Sup. Ct. 1957).

However, on the same day that the *Crowell-Collier Publishing Co.* case was decided, the New York Court of Appeals upheld the validity of a disclaimer clause in *Danann Realty Corp. v. Harris.*[30] The plaintiff in this case alleged that it was induced to enter into a contract of sale of a lease of a building held by the defendants because of false representations made by the defendants as to the operating expenses of the building and as to the profits to be derived from the investment. The plaintiff sued for damages for fraud in the inducement of the contract. The defendants made a motion to dismiss the complaint for failure to state facts sufficient to constitute a cause of action, and relied upon the following provision of the contract annexed to and made a part of the complaint:

> The Purchaser has examined the premises agreed to be sold and is familiar with the physical condition thereof. The Seller has not made and does not make any representations as to the physical condition, rents, leases, *expenses, operation* or any other matter or thing affecting or related to the aforesaid premises, except as herein specifically set forth, and the Purchaser hereby *expressly acknowledges that no such representations have been made, and the Purchaser further acknowledges that it has inspected the premises and agrees to take the premises 'as is'* . . . It is understood and agreed that all understandings and agreements heretofore had between the parties hereto are merged in this contract, which alone fully and completely expresses their agreement, *and that the same is entered into after full investigation, neither party relying upon any statement or representation,* not embodied in this contract, made by the other. The Purchaser has inspected the buildings standing on said premises and is thoroughly acquainted with their condition.[31]

The court of appeals reversed the determination of the appellate division and granted the defendants' motion to dismiss the complaint for legal insufficiency.

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[30] 5 N.Y. 2d 317, 157 N.E. 2d 597, 184 N.Y.S. 2d 599 (1959) (Fuld, J. dissenting).

[31] *Id.* at 320, 157 N.E. 2d at 600, 184 N.Y.S. 2d at 602.

Judge Burke, speaking for the majority of the court, distinguished the disclaimer clause involved from the general merger clause in the *Crowell-Collier Publishing Co.* case because it contained specific provisions which destroyed the allegation in the plaintiff's complaint that the agreement was executed in reliance upon contrary oral representations. The complaint therefore failed to state a cause of action since the written provision in the contract annexed to the complaint specifically negated the element of reliance which was necessary in order for the plaintiff to establish a cause of action for fraud in the inducement of the contract. The majority opinion relied upon *Cohen v. Cohen,*[32] where the plaintiff-wife sued the defendant-husband for damages for fraud inducing her to enter into a marital agreement which contained a disclaimer of liability for fraud as to a specific representation. The clause provided that neither husband nor wife had made any representations to the other including representations as to the continuation of the marital status outside of those expressed in the agreement which contained the entire understanding of the parties. The appellate division, first department, Breitel, J., dissenting, upheld the validity of this clause on the ground that it specifically negated the allegation of the wife's reliance on her husband's promise to live with her and support her, and dismissed the plaintiff's complaint for failure to state facts sufficient to constitute a cause of action.[33] The court of appeals affirmed this determination, Judges Fuld and Froessel dissenting upon the grounds stated in the dissenting opinion of Breitel, J., which were to the effect that the disclaimer was invalid as against public policy.[34]

The *Cohen* case aroused some criticism,[35] since the decision was in conflict with the well established rule in New

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[32] 1 App. Div. 2d 586, 151 N.Y.S. 2d 949, *aff'd,* 3 N.Y. 2d 813, 144 N.E. 2d 649, 166 N.Y.S. 2d 10 (1957).

[33] 1 App. Div. 2d 586, 151 N.Y.S. 2d 949 (1956).

[34] 3 N.Y. 2d 813, 144 N.E. 2d 649, 166 N.Y.S. 2d 10 (1957).

[35] Note, 25 FORDHAM L. REV. 529 (1956); Note, 8 SYRACUSE L. REV. 122 (1956).

York.[36] The court in the *Cohen* case, however, attempted to distinguish the rule that a person cannot exempt himself from liability for fraud by inserting a merger clause in his contract by pointing out:

> But the question in this case is not whether the conventional merger clause in the settlement agreement precludes plaintiff from introducing testimony to show that false inducing representations were made by the defendant. The question rather is whether plaintiff can possibly prove she relied on the misrepresentations, since such reliance is an essential ingredient of her cause of action . . . but it seems to us that the specific disclaimer in the agreement of the representation alleged in the complaint effectively destroys plaintiff's allegation that she executed the agreement in reliance upon defendant's representation.[37]

Though the distinction sought to be made in the *Cohen* case is clear, *i.e.,* that a specific disclaimer clause is to be treated differently from a conventional general merger clause, the distinction is unsupported by legal precedent. The *Cohen* case seems to be a departure from the basic principle that a person cannot escape liability for his fraudulent representations by so providing in a contract.

The opinion of Judge Burke in the *Danann Realty* case indicates that the maxim that fraud destroys every contract which it affects will not apply where the contract specifically provides that fraud should not destroy it. So it appears that in both the *Cohen* and *Danann Realty* cases, the court is upholding the validity of the disclaimer clause because the language therein seemed to cover the very false statements about which the plaintiff complained. Judge Burke emphasized the importance of the choice of words used in the disclaimer clause:

> If the language here used is not sufficient to estop a party from claiming that he entered into the contract because of fraudulent representations, then no language can

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[36] See cases *supra* note 29.

[37] Cohen v. Cohen, 1 App. Div. 2d at 587–588, 151 N.Y.S. 2d at 950–951.

> accomplish that purpose. To hold otherwise would be to say that it is impossible for two businessmen dealing at arm's length to agree that the buyer is not buying in reliance on any representations of the seller as to a particular fact.[38]

The effect of the decisions in the *Cohen* and *Danann Realty* cases is to estop the plaintiff from showing reliance on fraudulent representations. But the principle of estoppel is ''essentially equitable in nature,''[39] and should not be invoked to further the cause of fraud, which seems to be the result in these cases. Judge Fuld, dissenting in both cases, cites and discusses the leading cases which involved the validity and effect of the disclaimer clause.[40] While recognizing the fact that the clauses in the *Cohen* and *Danann Realty* cases were worded differently from those in the agreements involved in cases following the majority rule, he maintains that the so called specific disclaimer clause, ''. . . undoubtedly reflects the same thought and meaning, and the reasoning and the principles which the court deemed controlling in those cases, are likewise controlling in this one.''[41] Judge Fuld's strong opposition to the distinction sought to be made between general and specific disclaimer clauses in the *Danann Realty* case is brought out even more clearly: ''I cannot believe that the outcome of a case such as this, in which the defendant is charged with fraud, should turn on the particular language employed in the contract.''[42]

There seems to be no valid reason for holding that a party can specifically disclaim liability for fraud, but may not do so in general terms. The general includes the specific, and since the clause in the *Danann Realty* case was all-embracing, encompassing every representation that a seller could possibly make about the property being sold, the fact that it contained a specific and deliberate exclusion of a particular subject did not change the general nature of the clause. As a matter of public policy, fraudulent dealings of all kinds have been frowned upon by the courts. The public policy underlying the barrier against granting immunity from liability for fraud applies to every kind of merger clause.[43] In *Crowell-Collier Publishing Co. v. Josefowitz,* it was said that:

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[38] Danann Realty Corp. v. Harris, 5 N.Y. 2d at 323, 157 N.E. 2d at 603, 184 N.Y.S. 2d at 605.

[39] *Id.* at 332, 157 N.E. 2d at 612, 184 N.Y.S. 2d at 614.

[40] See cases *supra* note 29.

[41] *Id.* at 325, 157 N.E.2d at 605, 184 N.Y.S. 2d at 607.

[42] *Id.* at 326, 157 N.E. 2d at 606, 184 N.Y.S. 2d at 608.

> Since a violation of public policy is the rationale of the rule making merger clauses ineffectual where fraud is charged, the application of the rule in a particular case does not hinge upon mere semantics or fine distinctions in the use of language.[44]

The effect of the decisions in the *Cohen* and *Danann Realty* cases is to place the purchaser in a contract of sale at a disadvantage, because he will be refused relief if he signs a written agreement containing a specific disclaimer clause. The decisions will probably be relied upon hereafter by vendors, who having made misrepresentations, seek to avoid liability therefor, through the device of the disclaimer clause. But purchasers, in view of these decisions, will insist that vendors leave disclaimer clauses out of written agreements. The fear of the buyer lies in the realization that he will be estopped from proving that he was fraudulently induced to enter into the contract.

Judge Fuld, dissenting in the *Danann Realty* case, expressed his concern over the fact that the plaintiff was estopped from presenting evidence of fraud upon a trial because its allegation of reliance was destroyed and its complaint dismissed by reason of the specific terms of an exculpatory provision:

> Whether the defendants made the statements attributed to them and if they did, whether the defendants are

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[43] Soviero Bros. Contr. Corp. v. City of New York, 286 App. Div. 435, 142 N.Y.S. 2d 508, *aff'd,* 2 N.Y. 2d 924, 141 N.E. 2d 918, 161 N.Y.S. 2d 888 (1956); Crowell-Collier Publishing Co. v. Josefowitz, 9 Misc. 2d 613, 170 N.Y.S. 2d 373 (Sup. Ct. 1957), *aff'd,* 5 N.Y. 2d 998, 157 N.E. 2d 730, 184 N.Y.S. 2d 859 (1959).

[44] 9 Misc. 2d at 614, 170 N.Y.S. 2d at 374.

guilty of fraud are questions of fact not capable of determination on the pleadings alone. The plaintiff is entitled to its day in court.[45]

If the plaintiff's complaint is dismissed merely because his allegation of reliance is controverted by a provision in a written agreement, then the plaintiff will not have the opportunity to present his case to a jury to determine whether he actually relied upon representations which were in fact false. Assuming that the plaintiff was induced to enter into a contract through false statements made to him by the defendant, it is possible that the plaintiff can overcome the effect of the disclaimer clause by showing that all the elements in his cause of action for deceit are present, and that the clause itself was procured by fraud. The plaintiff, in such a case, should have an opportunity to go to trial to prove his reliance on the defendant's fraudulent statements, notwithstanding the existence of a disclaimer clause.[46]

The Effect of the Disclaimer Clause on the Parol Evidence Rule

When an action for fraud in the inducement of a contract is tried before a jury, the plaintiff will have the burden of proving the allegations in his complaint that false representations were knowingly made by the defendant, concerning a material fact upon which the plaintiff relied and was thereby induced to enter into the contract to his damage.[47] In offering proof of these allegations, the plaintiff might be met with an objection from the defendant that the evidence offered violates the parol evidence rule, and is therefore inadmissible.

The parol evidence rule is a rule of law which defines the limits of the contract to be construed,[48] and forbids proof of an oral agreement to add to or vary the writing.[49] However, where oral representations are sought to be proved for the purpose of showing that the written contract was induced by fraud, it has been held that the parol evidence rule is not applicable.[50] The reason for this is that oral representations which are claimed to have induced the plaintiff to enter into the written contract involve the state of mind of the defendant, which is unrelated and unconnected to the written provisions of the contract.[51] Professor Wigmore points out that since the parol evidence rule,

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[45] 5 N.Y. 2d at 333, 157 N.E. 2d at 614, 184 N.Y.S. 2d at 616.

[46] See Ganley Bros. v. Butler Bros. Bldg. Co., 170 Minn. 373, 212 N.W. 602 (1927); Tyler Realties v. Boper, 17 Misc. 2d 765, 183 N.Y.S. 2d 888 (Sup. Ct. 1959).

[47] Reno v. Bull, 226 N.Y. 546, 124 N.E. 144 (1919).

[48] Mitchill v. Lath, 247 N.Y. 377, 160 N.E. 651 (1928); Glacken v. Bennett, 226 Mass. 316, 115 N.E. 490 (1917).

> . . . depends on the intent of the parties to embody one or more subjects of transaction exclusively in the document, it is impossible to suppose that the subject of fraud was intended thus to be covered, since by hypothesis the party upon whom the fraud is practiced does not know of it and therefore could not have had such intent.[52]

However, where the parties agree that all conditions, promises and representations are contained in the writing and they will not be bound by anything not so contained, it would seem that the clause furnishes a reason for applying the parol evidence rule.[53] Should such a provision in a written contract be effective to prevent the plaintiff from proving his allegation of fraud? Based on the rule that any attempt to contract against fraud is contrary to public policy,[54] most courts have held that parol evidence is admissible to show fraudulent representations despite the presence of a disclaimer clause.[55] If any statement made by the defendant is admissible to prove that the contract was induced by fraud, then of what effect is a written provision specifically disclaiming liability for fraud?

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[49] Chapin v. Dobson, 78 N.Y. 74 (1879); Eighmie v. Taylor, 98 N.Y. 288 (1885).

[50] Adams v. Gillig, 199 N.Y. 314, 92 N.E. 670 (1910).

[51] 9 WIGMORE, EVIDENCE § 2439 (3rd ed. 1940).

[52] *Id.* at 325–326.

[53] Fogelson v. Rackfay Constr. Co., 300 N.Y. 334, 90 N.E. 2d 881 (1950); 3 WILLISTON, CONTRACTS § 811 A. (1936).

[54] See cases *supra* note 1.

[55] Commercial Credit Co. v. Childs, 199 Ark. 1073, 137 S.W. 2d 260 (1940); Standard Tilton Milling Co. v. Mixon, 243 Ala. 309, 9 So. 2d 911 (1941); Lufty v. Roper & Sons Motor Co., 57 Ariz. 495, 115 P. 2d 161 (1941); Hall v. Crow, 240 Ia. 81, 34 N.W. 2d 195 (1948); Brown v. Ohman, 42 So. 2d 209 (Miss. 1949); Bridger v. Goldsmith, 143 N.Y. 424,

In *Omar Oil & Gas Co. v. Mackenzie Oil Co.*,[56] the plaintiff objected to parol evidence of oral representations inducing the defendant to execute a written contract of sale which contained the following provision:

> The property hereby agreed to be sold has been examined and inspected by the vendee through its agent, and the same is hereby accepted in its present physical state without any representation or warranties on the part of the said vendor, other than to its title thereto. . . .[57]

The court held that this provision did not operate as a denial of the defendant's right to show that false representations had been made to him by the plaintiff to induce him to execute the contract. While a disclaimer clause may operate as an admission against the person seeking to establish the elements of fraud, the legal effect of such an admission should only make more difficult the task of establishing the allegations of representation, falsity, scienter, deception and injury.[58] The exculpatory provision, therefore, should not preclude proof of reliance on oral representations, but should be considered as a fact which tends to show that there was no reliance. The Delaware court in the *Omar Oil & Gas Co.* case expressed its objection to applying the parol evidence rule in cases where oral representations are alleged to have induced a party to enter into a written agreement containing a disclaimer clause:

> It would be dangerous in passing upon sales alleged to be fraudulent to hold that the buyer is bound and concluded by such an admission. The law is so diligent in dis-

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38 N.E. 458 (1894); Angerosa v. White, *supra* note 29; Jackson v. State, *supra* note 29; 3 WILLISTON, *op. cit. supra* at note 53; 9 WIGMORE, *op. cit. supra* at note 51.

[56] 33 Del. 859, 138 A. 392 (1926).

[57] *Id.* at 865, 138 A. at 398.

[58] Comment, *Special Provisions in Contracts to Exclude Contentions Based upon Parol Evidence,* 33 ILL. L. REV. 938 (1937).

> covering fraud and relieving against its consequences when relied on as a defense, that an admission by the vendee that there was no fraud in the sale, even where there has been an independent investigation of the property by the vendee, will not prevent him from showing and relying upon fraud that was present in the making of the contract and unknown to him at the time.[59]

The disclaimer clause may have some evidentiary value for the purpose of impeaching the party claiming fraud,[60] but if that party can show that the clause itself was induced by fraud, and that he did not understand its purport, such evidence should destroy its efficacy. "The scales should be tipped against the one who inserts the provision. . . ."[61]

In New York, there seem to be two conflicting views as to the effect of the disclaimer clause on the parol evidence rule: one which holds parol evidence as to fraudulent representations admissible;[62] and the other which precludes proof of such representations.[63] In *Benedict Co. v. McKeage,*[64] the plaintiff and defendant entered into a written contract whereby they agreed to trade second-hand automobiles. The plaintiff found fault with the Buick car which he purchased, claiming that its condition and character were not as represented. The contract expressed the following term: "It is mutually agreed that there are no promises, verbal understandings or agreements of any kind pertaining to this order not clearly specified in it."[65] Concerning this provision the court said:

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[59] 33 Del. at 865, 138 A. at 398.

[60] Gammon v. Ealey & Thompson, 97 Cal. App. 452, 275 P. 1005 (1929).

[61] *Op. cit. supra* at note 53, pg. 951.

[62] Outcalt Adv. Co. v. Stratton, 178 App. Div. 353, 164 N.Y. Supp. 792 (1917); Hubert v. Appostoloff, 278 F. 673, *aff'd,* 285 F. 161 (2d Cir. 1921); Benedict Co. v. McKeage, 201 App. Div. 161, 195 N.Y. Supp. 228 (1922); Bennett v. Burch-Buell Motor Corp., 221 App. Div. 517, 224 N.Y. Supp. 666 (1927); Ernst Iron Works Co. v. Duralith Corp., 270 N.Y. 165, 200 N.E. 683 (1936); 422 W. 15th St. Inc. v. Johnson's Estate, 258 App. Div. 227, 16 N.Y.S. 2d 383 (1939); Federal Brush Corp. v. A. Zerega's Sons Inc., 149 N.Y.S. 2d 374 (N.Y. City Ct. 1956). *But cf.* Sabo v. Delman, 3 N.Y. 2d 155, 143 N.E. 2d 906, 164 N.Y.S. 2d 714 (1957) (*dictum*).

[63] Malakoff v. Orson's Inc., 107 N.Y.S. 2d 33 (Sup. Ct. 1951); Axelroad v. 11 Riverside Drive Corp., 117 N.Y.S. 2d 597 (Sup. Ct. 1952); Pelnorth Const. Corp. v. Gordon, 6 Misc. 2d 533, 166 N.Y.S. 2d 984 (New Rochelle City Ct. 1956); Mandracchia v. McKee, 16 Misc. 2d 337, 167 N.Y.S. 2d 678 (Sup. Ct. 1957); *But cf.* Fogelson v. Rackfay Constr. Co., *supra* note 53.

[64] 201 App. Div. 161, 195 N.Y. Supp. 228 (1922).

> This stipulation precluded the plaintiff from setting up in an action upon a contract oral representations or warranties collaterally entered into. . . . It did not preclude it from asserting in an action of deceit, brought to recover damages resulting from its entry into the contract, that it was induced to make the contract by the false representations of the defendant as to the condition and character of the Buick car.[66]

The appellate division, fourth department, has also held that in an action for deceit, false statements knowingly made by defendants which induced the plaintiff to buy an automobile to his injury were admissible over defendants' objection that the contract of purchase was in writing and that oral testimony to vary its terms was inadmissible.[67]

The rationale of these decisions was thus defined: "Affirmance of the contract is not necessarily affirmance and ratification of the fraud inducing it. Waiver of the cause of action for inducing the contract by fraud is a matter of intention and an issue of fact to be established on trial."[68]

In *Ernst Iron Works Inc. v. Duralith Corp.,*[69] the New York Court of Appeals held that a general disclaimer clause to the effect that no representation or warranty shall be binding unless it has been incorporated in the agreement, was ineffective to prevent parol evidence as to fraudulent representations. Though the plaintiff in this case failed to prove that statements made by the defendant's agent were false, the court reiterated the rule that a person cannot exempt himself from liability for fraud by inserting in his contract a disclaimer clause.[70]

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[65] *Id.* at 162, 195 N.Y. Supp. at 229.

[66] *Ibid.* However, the appellate division, third department, reversed the trial court's verdict for the plaintiff on the ground that there was no evidence of the defendant's false representations and the plaintiff's reliance to sustain the verdict. Nevertheless, this was an express holding that the disclaimer clause does not bar the plaintiff from offering parol evidence of fraudulent representations.

[67] Bennett v. Burch-Buell Motor Corp., *supra* note 62.

[68] 422 W. 115th St. Inc. v. Johnson's Estate, *supra* note 62.

[69] 270 N.Y. 165, 200 N.E. 683 (1936).

In 1951, in *Fogelson v. Rackfay Constr. Corp.*,[71] the court of appeals, per Fuld, J., held that the parol evidence rule applied in a case involving the effect of a merger clause. The plaintiffs, tenants in two large apartment houses, in which the defendants were landlords, sought a mandatory injunction to require the defendants to restore a private bus service for them. They testified upon the trial that the manager of the apartment houses orally promised to furnish them with free bus service to the subway, a mile away, and after they moved into the premises, the defendants refused to furnish such service. They claimed that they were induced to sign the lease because of this oral representation, but there was no proof of fraud offered. The defendants objected to this testimony on the ground that it was used to vary the terms of a written lease which stated that it contained the entire agreement between the parties and that all prior agreements were merged therein. The court, in holding that parol evidence of the oral promise to furnish bus service was inadmissible, declared:

> In a very real sense, that merger clause announces and demonstrates the all inclusive nature of the written lease and furnishes still 'additional reason for applying the parol evidence rule.' . . . In truth, if the lease before us—complete on its face and drafted designedly and explicitly to prevent reliance upon any promise or agreement not included—could be varied and undermined by parol evidence, few written instruments would be safe or secure.[72]

This language has been relied upon in three recent lower court decisions [73] as authority for the proposition that in actions for fraud in the inducement of a contract, parol evidence of fraud is inadmissible in the face of a general disclaimer clause. The *Fogelson* case does not stand for this rule because the action there was based on contract and there was no allegation of fraud, therefore, the proof as to oral representations was offered not for the purpose of showing fraud, but to add to or vary the terms of the written lease. So the *Fogelson* case is distinguishable from those in which proof of fraud was the gist of the action, and it would seem that the three recent lower court decisions applying the parol evidence rule where there was both fraud alleged and a disclaimer clause involved, are not in accord with the majority rule as stated in *Ernst Iron Works Inc. v. Duralith Corp.*[74]

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[70] *Id.* at 169, 200 N.E. at 687.

[71] 300 N.Y. 334, 90 N.E. 2d 881 (1950).

[72] *Id.* at 340, 90 N.E. 2d at 887.

[73] Malakoff v. Orson's Inc., *supra* note 63; Axelroad v. 11 Riverside Drive Corp., *supra* note 63; Pelnorth Const. Corp. v. Gordon, *supra* note 63.

Since in actions for deceit or for rescission of a contract induced by fraud, the plaintiff has the burden of proof,[75] and since fraud is not presumed in these actions,[76] a written provision specifically controverting the allegation of fraud should have some evidentiary value. But the disclaimer clause should not be elevated to the rank of a conclusive presumption that there was neither reliance nor fraud, since that would give validity to the disclaimer clause and thereby violate public policy.[77]

As a practical matter, the disclaimer clause is a useful device against wrongful charges of fraud. Vendors do not want to be plagued with vexatious law suits based on the purchaser's unfounded claims of fraud. But if there is no fraud, that fact will be established on the trial.[78] So at least, a person complaining of fraud should have his day in court despite the presence of a disclaimer clause. However, while the party complaining of fraud should be allowed to introduce evidence of fraudulent statements upon the trial, the disclaimer clause should make the proof of fraud more difficult. Where a party agrees in writing not to rely on the false representations of another, such a written agreement is in effect, an admission against the party claiming fraud and should be considered as a fact tending to show that there was no reliance.

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[74] 270 N.Y. 165, 200 N.E. 683 (1936).

[75] Reno v. Bull, 226 N.Y. 546, 124 N.E. 144 (1919).

[76] Hathaway v. Harris, 1 App. Div. 2d 255, 149 N.Y.S. 2d 456 (1956).

[77] Bridger v. Goldsmith, 143 N.Y. 424, 38 N.E. 458 (1894).

[78] See Lufty v. Roper & Sons Motor Co., 57 Ariz. 495, 115 P. 2d 161 (1941); Tyler Realties v. Boper, 17 Misc. 2d 765, 183 N.Y.S. 2d 888 (Sup. Ct. 1959).

RICHARD T. ROSEN

Effect of Zoning Ordinances and Violations Upon Marketability of Property

The effect of restrictive covenants upon marketability of title has been the subject of frequent adjudication since at least the middle of the last century.[1] It has been said that a marketable title is one which a reasonably prudent man would be willing to accept. A purchaser is entitled to demand a title which will give him reasonable security against either loss or annoyance by litigation. The question of whether that title will ultimately prevail is not so important as its freedom from attack. Many courts have said that a marketable title is one entirely deducible of record. Evaluations of marketability are made to depend upon the actual or possible existence of outstanding interests in persons other than the present owner. The existence of these outstanding interests, is ordinarily ascertained from an examination of the record back to some recognized root of title.[2] On the other hand, the effect of zoning laws and violations on marketability of property has become a problem only within the last fifty years.

A brief review of the courts' attitude concerning restrictive covenants is helpful. A good example is the case of *Dieterlan v. Miller.*[3] The court held that the vendor of real estate who contracts to convey a title free from encumbrances cannot compel specific performance when the premises are subject to restrictive covenants running with the land which prohibit the carrying on of any noxious, offensive or dangerous trade or business. Where the vendor contracts to convey land free and clear of all encumbrances and the record title shows a covenant running with the land prohibiting construction within twelve feet from the front end of the lot, the court will hold the promise broken. It was held in *Wetmore v. Bruce* [4] that in such a situation the title tendered by the vendor is not free and clear from encumbrances since the covenant constitutes an incumbrance and the vendor is justified in refusing to complete his purchase. The court found in *Lynbrook Gardens v. Ullman* [5] that it would decree specific performance of the contract of purchase only if the deed which the purchaser would be compelled to accept transfers a title which cannot thereafter be challenged on substantial grounds.

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[1] An early example is Tulk v. Moxhay, 2 Ph. 774, 41 Eng. Rep. 1143 (1848). See, *e.g.*, Post v. Weil, 115 N. Y. 361, 22 N. E. 145 (1889); VanVliet & Place Inc. v. Gaines, 249 N. Y. 106, 162 N. E. 600 (1928).

[2] BASYE, CLEARING LAND TITLES §§ 4, 5 (1953).

[3] 114 App. Div. 40, 99 N. Y. Supp. 699 (1906).

The reason that this particular aspect of the problem of marketable title (zoning laws and violations thereof) has not arisen too often before now is that in most cases a zoning violation does not appear in the title record. In *Josepowicz v. Porters,*[6] the plaintiff brought suit to recover his down payment on four and one-half acres of land to be used in raising chickens. The defendant seller had guaranteed that there were no restrictions in any conveyance or plans of record which would prevent the use of the property as a poultry and egg farm. The plaintiff found that the local zoning ordinances prohibited the use of the land as a chicken farm and therefore defeated plaintiff's plans. The court said in deciding for the vendor:

> We cannot pervert the meaning of 'restrictions in any . . . plans of record affecting the said premises' to include the zoning ordinances of the City of Lynwood. A zoning ordinance is not a 'plan of record.'

In New York State zoning ordinances are usually found in master plans and all modifications thereof, which are on file in the office of the municipal planning board and certified copies of which are filed by the planning board in the offices of the city engineer and the city clerk.[7]

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[4] 118 N. Y. 319, 23 N. E. 303 (1890).

[5] 291 N. Y. 472, 53 N. E. 2d 353 (1943). See also Riggs v. Pursell, 74 N. Y. 370 (1878).

[6] 32 N. J. Super. 585, 591–592, 108 A. 2d 865, 868 (1954).

The first question concerning the marketability of title in reference to zoning laws is the effect which existing laws have on the contract of sale. Where a person agrees to purchase real estate which at the time is restricted by laws or ordinances, he will be deemed to have entered into a contract subject to them. He cannot thereafter be heard to object to taking the title because of such restrictions. In *Lincoln Trust Co. v. Williams Building Corp.*,[8] the defendant contracted to purchase free from all encumbrances. New York City had already in effect a zoning law permitting only residential building, and since the defendant had planned to use the land commercially he refused to complete the contract. Upon suit for specific performance by plaintiff-vendor, the contract was held to be enforceable.

The *Lincoln Trust Co.* case seems to lay down the rule that contract purchasers should ordinarily be deemed to have implied knowledge of local zoning laws and contract with reference to them. The next question that arises concerns the position of the parties who enter into a contract for the sale of real property where between the date of contract and the closing date a new zoning ordinance is passed which completely frustrates the vendee's purpose in purchasing the real estate. *Anderson v. Steinway & Sons* [9] is a case in point. Here plaintiff agreed to convey a plot of land free from all encumbrances except certain existing covenants embraced in an earlier deed. The defendant agreed to buy on these terms, intending to erect upon the property a business building, having no other use for the property as the plaintiff-vendor knew. Between the contract and closing dates, New York City passed a zoning law prohibiting business buildings in the district in which the vendee wished to build. The vendor brought an action against the vendee for specific performance and lost. The court stated the rule laid down in the *Lincoln Trust Co.* case to the effect that if a person contracts to purchase a building which is restricted as to the manner of its use by laws and ordinances existing when the contract is made, he will be deemed to purchase the property subject to them. The court went on to say that where, after the contract had been entered into, the lawmaking power steps in and takes action which makes it impossible for the vendor to convey, and for the vendee to acquire what the vendee had intended and expected to acquire, it would be unfair to grant specific performance. The defendant here agreed to buy, and understood that it would buy, a parcel of land that was unrestricted and would not have agreed to purchase it if the land had been restricted. The court seemed to imply that because both parties had knowledge of the vendee's plans, the contract should be deemed to call for a title free of any restrictions created by zoning laws which would prohibit it from carrying out its intention.[10]

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[7] N. Y. GENERAL CITY LAW § 28-a; N. Y. TOWN LAW § 272-a.

[8] 229 N. Y. 313, 128 N. E. 209 (1920).

[9] 178 App. Div. 507, 165 N. Y. Supp. 608 (1917), *aff'd,* 221 N. Y. 639, 117 N. E. 575 (1917).

An analogy may be drawn between the principle in the above case and the theory of frustration of purpose, where the courts will hold that a contract is at an end without being breached.[11] The case of *Heine v. Mayer*[12] is a good example of this proposition. The plaintiff was under a contract to do certain work in altering a building to fit the owner-defendant's needs. After the work had been commenced, the municipality's Superintendent of Buildings forbade the furtherance of construction because of a defective wall upon which another wall was to be built. The plaintiff stopped work and sued for the work already done. The court in deciding for the plaintiff held that where the further prosecution of work is forbidden by law and the contractor is prevented from performing that which by the terms of the contract is made a condition precedent to payment, he is discharged from performance and entitled to recover at the contract price for the work done. *O'Neil v. Derderian*[13] is another case in point. The defendant here leased a tenement house from the plaintiff and nine days later the New York Multiple Dwelling Law was passed and the defendant lessee was in violation thereof. The lessee refused to pay his rent and his lessor sued for its non-payment, but did not recover. The use provided for in the lease was an unlawful undertaking and as such, the lease was void. The fact that the use became unlawful after the execution of the lease did not save it from the taint of illegality, since the lease was at an end and could not furnish the basis of the landlord's claim for rent. A New York case in point is *Doherty v. Eckstein Brewing Co.*[14] Here the defendant leased certain premises to be used as a saloon only. When the eighteenth amendment to the federal constitution was passed, the defendant lessee notified his landlord that it intended to abandon the premises and did so. The plantiff-landlord sued for the rent and did not recover. There is no distinction in principle between a contract which is unlawful at the time it is made and one in which, by subsequent change of the law, further performance becomes unlawful.

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[10] Query as to where at the date of contract the vendor has no knowledge of the buyer's intention? Is he to forego his remedy of specific performance because of the vendee's undisclosed plans? *Cf. Levin v. Kessena Manor Corp.,* 184 N.Y.S. 2d 863 (Sup. Ct. 1959).

[11] 6 WILLISTON, CONTRACTS §§ 1954, 1955 (Rev. Ed. 1938).

[12] 61 N.Y. 171 (1874).

So far we have reviewed what the courts have said concerning zoning laws affecting the use of land. What of contracts for the sale of land where there is already an existing violation, as for example, where the building in question is over the set-back line required by the local zoning ordinances? The case of *Oatis v. Delcuze*[15] concerned a purchaser, the plaintiff, who agreed to buy a building with three apartments, which was in violation of the New Orleans zoning laws. There was a question as to whether the violation was there before or after the zoning ordinance was passed which excused existing violations. The court, speaking on both sides of the question, determined that if the building or its non-conforming features existed prior to the date of the ordinance, the purchaser acquiring from the owner obtains a title that is free of the encumbrances which may result and is protected against the penalties provided in the ordinance. On the other hand, if the non-conforming building is erected after the passage of the ordinance, there results a violation of its terms which materially affects the title of the property. The policy of the law is not to compel a person to purchase under an agreement for the sale of real property where there is a substantial doubt as to the title or where title is in such condition as to expose the purchaser to litigation.[16]

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[13] 138 Misc. 488, 246 N. Y. Supp. 341 (1930).

[14] 198 App. Div. 708, 191 N. Y. Supp. 59 (1921). See also Stratford Inc. v. Seattle Brewing Co., 94 Wash. 125, 162 P. 31 (1916).

[15] 226 La. 751, 77 So. 2d 28 (1954).

Mayer v. DeVincentis Construction Co.[17] is another case in point. Here the plaintiff agreed to buy a home, which defendant had built, free and clear of all liens and encumbrances, excepting existing restrictions and easements, if any. The house was built in violation of the zoning set-back lines. The court stated that the title was unmarketable, not because of an existing zoning ordinance, but because a building had been constructed upon the lot in violation of that ordinance. One is not compelled to purchase under an agreement for the sale of real estate where there is a reasonable doubt as to title, or where the title is in such a condition that the purchaser will be exposed to litigation.

It is familiar law that an agreement to make a good title is always implied in executory contracts for the sale of land, and that a purchaser is never bound to accept a defective title unless he expressly stipulates to take such title, knowing its defects. His right to an indisputable title, clear of defects and encumbrances does not depend upon the agreement of the parties, but is given by law. It has often been held that a title is not marketable when it exposes the party holding it to litigation.[18] Executory agreements for the purchase of land are frequently made under circumstances which afford neither time nor opportunity for a thorough examination of the record title and the purchaser cannot be assumed, prior to entering into such agreement, to have investigated the title. He executes the agreement in reliance upon the understanding that he is to have a title both good and marketable. Where a vendee seeks to rescind a contract for the sale of real estate, on account of a defect of the title, the question as to materiality of the defect is one of fact, when it depends upon and is an inference to be drawn from the circumstances. The right of specific performance by a decree of a court of equity rests in the judicial discretion, and may be granted or withdrawn upon consideration of all the circumstances and in the exercise of discretion.[19]

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[16] The court will not compel the purchaser to buy a lawsuit. MAUPIN, MARKETABLE TITLE TO REAL ESTATE 775 (3d ed. 1921).

[17] 107 Pa. Super. 588, 164 A. 111 (1933). See also Stern v. Karlson 16 Misc. 2d 906, 185 N.Y.S.2d 602 (Sup. Ct. 1959).

[18] Moore v. Williams, 115 N. Y. 586, 22 N. E. 233 (1889).

Another case in point is *Acme Realty Co. v. Schinasi*[20] where the defendant-purchaser refused to accept title because of an encroachment of one foot over the building line in the streets of New York City, which therefore made title unmarketable. The defendant claimed that since the city was now enforcing its rights after many years of permitting the encroachments, he should not have to accept plaintiff's tender of title. The court remarked that under these circumstances it could not be said that a vendor has a marketable title. If the building encroaches upon the public streets to such an extent as to threaten a vendee with a substantial loss in the fee and rental value of the premises, and a burdensome expense in altering the building to meet the requirements of the law it is unmarketable. The court went on to say that a vendee has the right to a title that will enable him to hold his land in peace, and to be reasonably sure that no flaw or doubt will arise to affect its marketable quality and value.

Prior to the *Acme Realty* case in the City of New York, the courts had consistently held that such a violation did not affect marketability. It had been held that since the city had not enforced its rights for so long, it never would.[21] While the *Acme Realty* case did not seem expressly to overrule the earlier decisions, in effect it did so. Apparently the City of New York was finally taking steps to enforce its rights.[22]

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[19] McPherson v. Schade, 149 N. Y. 16, 43 N. E. 527 (1896).

[20] 215 N. Y. 495, 109 N. E. 577 (1915).

According to Davis, an authority on marketability of title, the courts do not and will not pass on a doubtful question of law or fact where all the parties are not before the court.

> . . . [T]here is such a thing as a doubtful question of law and that a purchaser need not be compelled to accept a title involving such question.
>
> As the Court of Appeals has said in the leading case of *Fleming v. Burnham,* 100 N.Y. 1: 'The objection may involve a mere question of fact or it may involve a pure question of law upon undisputed facts. In either case it may happen that the question is so doubtful that although the court would decide upon it upon the facts disclosed, in a proceeding where all the parties interested were before the court, nevertheless it would decline to pass upon it in a proceeding to compel a purchaser to take title, and it would relieve him from his purchase. The reason is obvious. . . . A title open to reasonable doubt is not a marketable title. The court cannot make it such by passing upon an objection depending upon a disputed question of fact, or a doubtful question of law, in the absence of the party in whom the outstanding right was vested. He would not be bound by the adjudication and could raise the same question in a new proceeding.' [23]

The next aspect of this problem concerns the *de minimis* doctrine as expounded by both the California and New York courts. *Traxler v. McLeran*[24] held that under the *de*

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[21] Levy v. Hill, 70 App. Div. 95, 75 N. Y. Supp. 19 (1902).

[22] The town board or village board may provide by ordinance for the enforcement of any ordinance or regulation made thereunder. A violation is punishable by fine, imprisonment or both. Each week's violation is a separate additional violation. N. Y. TOWN LAW § 268; N. Y. VILLAGE LAW § 179c. See also N. Y. GEN. CITY LAW § 38-a.

[23] Davis, MARKETABILITY OF TITLE IN NEW YORK 22, 23 (1916).

[24] 116 Cal. App. 226, 2 P. 2d 553 (1931).

minimis rule, the improvements overlapping the sidewalk by three-quarters of an inch and on the adjoining property, the walls of which were in place, constituted no defect in title. In New York, *Macdonald v. Bach*[25] held that an encroachment of three-quarters of an inch on the adjoining property would not enable the vendee successfully to defend a suit for specific performance on the theory that the title was unmarketable. Though this case concerned the encroachment of a building on neighboring land, it seems that the *de minimis* doctrine should apply equally to zoning violations because of the unreasonableness of enforcement. The question as to whether encroachments by adjacent buildings makes a title unmarketable will be determined upon the merits of each case.[26] The case of *Merges v. Ringler*[27] found that a variation of one-half of an inch in a distance of one hundred forty one feet did not constitute a substantial defect, where it was not disputed that the purchaser will obtain a good title to all property included within the boundaries as described in the advertisement of sale.

As a practical matter, in examining a title for a defect in relation to zoning violation, counsel for the parties should examine the particular zoning ordinance which is violated to see if the defect really comes within the purview. Illustrating the advisability of an examination is the case of *Mendoza v. Glorioso*,[28] in which the court held that the vendor had a cause of action for specific performance where his building encroached one and two-tenths of an inch on the sidewalk. The court referred to the ordinance in question and found that it did not apply to buildings already in violation of such ordinance where it could not be removed without damage to the owner. The building in question had been built prior to the ordinance. As a rule most zoning laws make provision for existing violations and provide that they are not in violation thereof.

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[25] 51 App. Div. 549, 64 N. Y. Supp. 831 (1900).

[26] Ungrich v. Shoff, 119 App. Div. 843, 105 N. Y. Supp. 1013 (1907).

[27] 34 App. Div. 415, 54 N. Y. Supp. 280 (1898).

[28] 167 La. 701, 120 So. 57 (1929).

The general practice in some areas seems to be for attorneys certifying titles not to check for existing or potential zoning violations because usually they are not indicated in the abstract of title. The standard title insurance policy specifically exempts zoning violations from its coverage. The Home Title Guaranty Company says:

> The operations of title companies up to the present time have not contemplated the furnishing of any zoning information or guaranteeing the accuracy thereof even on a basis of limited liability. Even if such services were made available under presently existing conditions it could only be done at considerable expense and with great risk.[29]

It would seem from the foregoing discussion that an attorney, in order to protect his client's interest, should check, especially in the case of new construction, the applicable zoning laws and request from the seller a survey map to make sure that his client will not be purchasing a law suit. The difficulties which could arise are clearly illustrated in the cases *Mayer v. DeVincentis Construction Co.,*[30] *Oatis v. Delcuze,*[31] and *Acme Realty Co. v. Schinasi.*[32] Lawyers representing purchasers for business purposes should always check the local zoning regulations, as shown in *Lincoln Trust Co. v. William Building Corp.*[33] and check further to see if the local zoning board is planning a change in his client's particular neighborhood, which could happen as it did in *Anderson v. Steinway & Sons.*[34] This same thoroughness should be observed where a client wishes to build a residential home on unimproved land. In all cases the attorney should remain aware of the problems which may possibly be created by zoning regulations and violations thereof with respect to use or marketability.

RONALD J. PASSERO

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[29] Home Title Guaranty Company, *Pitfalls of Zoning, A Guide for Attorneys* at 39 (1959).

[30] *Supra* note 17.

[31] *Supra* note 15.

[32] *Supra* note 20.

[33] *Supra* note 8.

[34] *Supra* note 9.

Loopholes in New York's Multiple Offender Statutes for the "Interstate" Criminal

The problem of dealing effectively with the persistent offender and habitual criminal to achieve remedial results with this class of criminals has long existed. The classic approach to the treatment of multiple offenders is to increase their punishment upon conviction of a subsequent offense.[1] The theory relied upon to support this plan is that the offender's persistent misconduct and his apparent lack of reformation after previous punishment for crime merits greater punishment to deter him from his criminal conduct.[2]

The applicable multiple offender laws in New York State are embodied in sections 1941, 1942, 1943 of the New York Penal Law.[3] Section 1941 provides the punishment for second and third offenders while section 1942 concerns a special category of criminals, the fourth offender.

The administration of the multiple offender statutes provided little trouble for the early 19th century courts since crime was usually a local occurrence and the criminals remained relatively immobile. The determination of prior crimes of the subsequent offender to use as a basis for his increased punishment under the existing multiple offender laws was simply made, by an examination of the New York penal statutes. But the advent of increased mobility resulted in the appearance of the itinerant or "interstate" criminal; no longer confined to his proximate area, the persistent offender enlarged his territory of illegal operations to include different foreign states. Because the New York statutes [4] included in their definition of a multiple offender a person convicted under the laws of any other state of a crime which, if committed within this state, would be a felony, the difficulty arose in measuring the subsequent offender's previous out-of-state conviction to determine the character and grade of that offense.[5] The resulting categorical problem envisions a classification of foreign state crimes into felonies and misdemeanors measured, however, by New York State penal laws. This determination is of primary concern because unless the foreign crime would be a felony if perpetrated in New York, that previous conviction cannot be counted to punish the persistent itinerant criminal as a second, third or fourth offender.[6] The criterion employed to classify and distinguish these foreign offenses for purposes of the New York Multiple Offender Statutes was not particularly controversial until recently.

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[1] N. Y. Sess. Laws 1796, ch. 30. See also People v. Youngs, 1 Cai. R. 37 (N.Y. Sup. Ct. 1803) and People v. Butler, 3 Cow. 347 (N.Y. Sup. Ct. 1824); People v. Powers, 7 Barb. 462 (N.Y. Sup. Ct. 1849), *aff'd,* 6 N.Y. 50 (1851) (prior convictions used to increase punishments).

[2] See Graham v. West Virginia, 224 U.S. 616, 623 (1911).

[3] New York Penal Law § 1941. "A person, who, after having been once or twice convicted within this state, of a felony, of an attempt to commit a felony, or, under the laws of any other state, government, or country, of a crime which, if committed within this state, would be a felony, commits any felony, within this state, is punishable upon conviction of second or third offense, as follows. . . ." § 1942 includes the essential terms of § 1941 but only applies to the punishment given for the fourth felony conviction; that punishment allows a maximum sentence of life imprisonment. § 1943 prescribes the procedures relating to resentencing as a recidivist after sentence or conviction.

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[4] The history of these statutes begins in 1796 (see note 1, *supra*). Essentially the same statutory language was employed in one of the earliest multiple offender laws, N. Y. Sess. Laws 1823, ch. 160, § 6, and also in 2 Rev. Stat. 699 § 10 (1829) with the exception of the term "felony," which was substituted for the clause "imprisonment in a state prison." These laws became § 688 of the Penal Code in 1881 and remained so until 1909 when that section became § 1941. In 1926 the "Baumes Laws," New York's present §§ 1941–1943 of the NEW YORK PENAL LAW were enacted.

[5] *But cf.* People v. Caesar, 1 Parker, Cr. R. 645 (N.Y. O. & T. 1855). Some early New York courts had decided that prior foreign convictions could not be used to punish as a second offender and would only consider prior New York crimes.

[6] Crimes which are not felonies in New York. See People v. Wood, 145 Misc. 678, 261 N.Y. Supp. 892 (Saratoga County Ct. 1932) (impersonating an officer or federal employer); People v. Sassone, 12 N.Y.S. 2d 473 (Kings County Ct. 1939) (transporting stolen auto in interstate commerce); People v. Gutterson, 244 N.Y. 243, 155 N.E. 113 (1926) (using mails to defraud).

The most recent test[7] to determine the grade of the previous out-of-state crime is to examine the operative and material facts which constitute the crime as defined by the *statute* of the other state; and these facts may not be extended or enlarged by allegations in the indictment or by evidence at the trial. This formula has repeatedly created a problem of statutory exegesis because the language of penal laws varies a great deal among states and the scope and classification of crimes is often treated differently by each state. This lack of uniformity in state penal laws along with the application of the "statute" test by the New York courts has led to flagrant abuses of the multiple offender laws and has developed loopholes through which the "interstate" criminal is escaping full punishment.

The leading case in New York which set forth this "statute" test is the much criticized *People v. Olah.*[8] The facts of that case show that defendant Olah was sentenced as a second felony offender under section 1941 on the basis of a 1933 New Jersey conviction for larceny. The appellate division, first department, affirmed his conviction as a multiple felony offender but the New York Court of Appeals reversed, three judges dissenting. Olah had previously been convicted in New Jersey on his plea of guilty to an indictment charging him with the theft of a watch and wallet containing two hundred dollars. The New Jersey penal statute defining the offense of larceny[9] makes a theft of twenty dollars or more a felony whereas the New York statute[10] requires the theft to exceed one hundred dollars in value to be considered a felony. Judge Fuld writing the majority opinion applied the "statute" test and concluded that since the crime as committed in New Jersey under their larceny statute (which requires only twenty dollars or more to constitute a felony) would not be a felony if committed in New York, Olah was improperly sentenced as a second felony offender.[11] The majority opinion stated that the defendant's crime should have been measured by the operative facts which constituted the criminal offense as defined by the statute upon which the indictment was drawn.[12] Applying this yardstick, the majority decided that the crime of which defendant was convicted in New Jersey was that of stealing twenty dollars or more, despite the fact that Olah had pleaded guilty to an indictment charging him with the theft of over two hundred dollars. A distinction was drawn between the crime of which the offender was convicted and the act which he may have actually committed. This construction given section 1941 of the Penal Law would measure the extent of the offender's prior criminality by reference to the language of the foreign statute. The court seemed to imply that any other facts recited in the indictment which are not specified in the statute upon which it is based are to be considered immaterial and surplusage.[13]

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[7] See People v. Olah, 300 N.Y. 96, 89 N.E. 2d 329 (1950), Annot., 19 A.L.R. 2d 219 (1951). See also, People v. Love, 305 N.Y. 722, 112 N.E. 2d 845 (1953), and People v. French, 5 App. Div. 2d 852, 171 N.Y.S. 2d 471 (1958).

[8] See note 7, *supra.* Criticized in 50 COLUM. L. REV. 247 (1950); 36 VA. L. REV. 540 (1950); 63 HARV. L. REV. 1448 (1950); and 25 N. Y. U. L. REV. 653 (1950).

[9] N. J. STAT. ANN. § 2–145–2.

[10] N. Y. PENAL LAW §§ 1296, 1299, 1897 subdiv. 5.

To support this view of foreign convictions the court relies heavily upon *People ex rel. Newman v. Foster*[14] as upholding the measurement of the crime by the statute which defines it. But the *Newman* decision, seems to agree more completely with the dissenting opinion by Chief Judge Conway in *Olah* as to the test to be applied under section 1941. He points out that the prevailing test for years prior to *Olah* was cogently described by Judge Fuld in the *Newman* case.

> Whether the *acts* committed in the foreign jurisdiction would be felonious if committed within this state, depends,

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[11] People v. Olah, *supra* note 7, at 98, 89 N.E. 2d at 331.

[12] *Id.* at 102, 89 N.E. 2d at 332.

[13] *Id.* at 99–100, 89 N.E. 2d at 331.

[14] 297 N.Y. 27, 74 N.E. 2d 224 (1947).

> of course, upon New York law. What those *acts* were, however, is to be determined by reference *only* to the foreign judgment of conviction and the *indictment* or *information* upon which it was predicated and the court is restricted to consideration of the operative and material facts *therein set forth*. . . .[15]

The complete ramifications of the *Olah* rule can not be appreciated until one realizes that any prior conviction of a larceny in a foreign state which maintains a monetary limit of less than one hundred dollars to distinguish a felony and misdemeanor theft, could never be used in New York under sections 1941 and 1942. Therefore, for example, the difference in monetary amounts between the New Jersey (twenty dollars) and New York (one hundred dollars) larceny statutes would prohibit the tabulation of a prior New Jersey larceny as a felony conviction under sections 1941 and 1942 and prevent any increased punishment to the "interstate" persistent offender. To illustrate the dangerous results possible in applying the *Olah* doctrine Chief Judge Conway in his dissent reveals the astonishing fact that forty-five other states set the dividing line between petit and grand larceny at less than one hundred dollars.

> A thief may commit one or many larcenies of thousands of dollars in any one of several or in each of those forty-five states, be convicted there any number of times of larceny as a felony and yet still have New York State to which he may come where he will be a first offender no matter what felony he may here commit.[16]

It is indeed incredible that the legislative intent behind the multiple offender statutes should produce such unreasonable results.

The dissenters in the *Olah* court felt that the appropriate test to apply to measure the crime was the *acts* of the offender as set forth in the indictment in the foreign jurisdiction. The dissent points out that this test had been the accepted New York doctrine for the last one hundred and twenty-five years and this fact is reinforced by a long line of previous decisions[17] which also considered the question of what constitutes a former conviction within sections 1941 and 1942 of the Penal Law[18] ". . . and determined that the *only* test for us was the *acts* of the accused in the foreign state."[19] Furthermore, Chief Judge Conway infers legislative approval of this established construction since the multiple offender statutes have been amended several times during the past by the legislature and yet it never disputed the judicial interpretation given to sections 1941 and 1942 previous to *Olah.*

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[15] People v. Olah, *supra* note 7, at 105–6, 89 N.E. 2d at 334 (dissenting opinion per Conway, C.J.).

[16] *Id.* at 104–5, 89 N.E. 2d at 334.

In light of the facts set forth in the New Jersey indictment (theft of two hundred dollars), it is difficult to understand how the majority in the *Olah* case could disregard these facts as surplusage and adhere to their major premise that the prior New Jersey conviction proved nothing more than a theft of twenty dollars, the statutory minimal requirement. To ignore as immaterial any acts in the indictment beyond the specific statutory language of the foreign state seems unrealistic. The court knew that if the defendant had committed a theft of two hundred dollars in New York, it would surely be considered a felony, and it would appear that a review of the criminal acts as stated in the indictment is imperative to any practical application of the multiple offender laws. It is also difficult to recognize the principle that a crime is to be measured and limited by the statute which defines it[20] which the court declared it obtained from the *Newman* case, when it is considered that the "acts in the indictment'' criterion was actually set forth in that same decision.[21]

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[17] *Accord,* People *ex rel.* Newman v. Foster, *supra* note 14 (1947); People v. Wicklem, 183 Misc. 639, 53 N.Y.S.2d 88 (Onondaga County Ct. 1944); People v. Voelker, 222 App. Div. 717, 225 N.Y.Supp. 883 (1927); Emert v. Thorn, 249 App. Div. 301, 292 N.Y.Supp. 58 (1936); People v. Sickles, 156 N.Y. 541, 51 N.E. 288 (1898); People v. Dacey, 166 Misc. 827, 3 N.Y.S. 2d 156 (N.Y.Co. Ct. Gen. Sess. 1938).

[18] Contrary to Judge Fuld's declaration that *Olah* was a case of first impression, *supra* note 7, at 101, 89 N.E. 2d at 332.

[19] People v. Olah, *supra* note 7, at 107, 89 N.E. 2d at 335 (dissent).

[20] *Id.* at 99, 89 N.E. 2d at 331.

Regardless of any attempts to justify the *Olah* rule, it is apparent from subsequent decisions [22] that its application has rendered the legislation less effective in its design to punish persistent offenders more severely and protect the public from the habitual criminal. The *Olah* doctrine has rendered the multiple offender statutes relatively powerless to deal with the itinerant persistent offender who, as a result of the ''statute'' test, carries a clean record with him when he enters New York State. Now, many habitual criminals with various previous convictions are returning to prison in New York as first offenders.[23] Many criminals long imprisoned in New York as multiple felony offenders have challenged their old sentences since 1950 through writs of habeas corpus and *coram nobis* proceedings and have successfully applied the *Olah* rule to obtain resentencing as a lesser felony offender.[24]

A review of the multiple felony offender cases decided before the innovation of the *Olah* doctrine in 1950 support conclusively Chief Judge Conway's suggestion that the established method of determining the nature of the foreign state conviction was to examine the acts which the defendant had committed there as charged in the foreign indictment, or information, and judgment of conviction and determine whether those acts would constitute a felony, if committed in New York. Proof that the earlier courts consistently relied upon this criterion to determine the classification of the crime in New York, is demonstrated by the fact that in most of the cases occurring before 1950 no mention of the foreign penal statutes even existed.[25] They appear to have relied exclusively upon the foreign indictment and judgment of conviction. Aside from the *Newman* decision, earlier cases which adhere to the "acts" test were *People v. Wicklem, People v. Dacey* and *People v. Voelker.*[26]

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[21] *Cf.* text accompanying note 15, *supra.*

[22] See Annot., 19 A.L.R.2d 262 (1951).

[23] People v. Swinson, 284 App. Div. 284, 131 N.Y.S.2d 467 (1954); People *ex rel.* Marsh v. Martin, 308 N.Y. 823, 125 N.E. 2d 873 (1955).

[24] See People v. Gifford, 2 App. Div. 2d 642, 151 N.Y.S. 2d 982 (1955); People v. French, *supra* note 7; People v. Zuccaro, 200 Misc. 41, 108 N.Y.S. 2d 97 (N.Y. Co. Ct. Gen. Sess. 1951); People v. McDowell, 200 Misc. 46, 105 N.Y.S. 2d 971 (N.Y.Co. Ct. Gen. Sess. 1951) and People v. Kromick, 308 N.Y. 866, 126 N.E. 2d 307 (1955).

In the *Wicklem* decision the defendant moved to vacate his sentence as a fourth felony offender on the grounds that two of his previous 1928–29 Pennsylvania larceny convictions would not be felonies in New York since they were both thefts of under one hundred dollars. He also asserted that two other Pennsylvania convictions were obtained through a plea of guilty without any indictment by a grand jury, a practice authorized by Pennsylvania statutes and constitutional in that state, but expressly held to be unconstitutional in New York.[27] Concerning the first two previous Pennsylvania felonies which the defendant alleged to be only misdemeanors in New York, the court stated that the Pennsylvania indictments alleged values of two hundred and twenty dollars and two hundred dollars in each respective charge, that the defendant pleaded guilty to these charges and should not now be permitted to attack the conviction. The court also declared that it must accept the facts as to value in the indictment upon which the previous conviction was obtained.[28] As for the other two crimes which defendant claimed to be invalid in this state, the court, although recognizing the invalidity of the Pennsylvania statutes under New York law, nevertheless stated that section 1942 is mandatory as long as the foreign convictions were legal in the foreign state.[29]

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[25] See Emert v. Thorn, *supra* note 17 and Matter of Cedar v. Judges of Court of General Sessions, New York County, 240 App. Div. 182, 269 N.Y.Supp. 733 (1934); People v. Stovali, 172 Misc. 469, 15 N.Y.S. 2d 498 (Kings County Ct. 1939).

[26] See note 17, *supra.*

[27] See People *ex rel.* Battista v. Christian, 249 N.Y. 314, 164 N.E. 111 (1928) (where a similar New York statute was struck down as unconstitutional).

[28] People v. Wicklem, *supra* note 17, at 642, 53 N.Y.S. 2d at 91.

[29] *Id.* at 643–4, 53 N.Y.S. 2d at 93. See also, People *ex rel.* Fellman v. Foster, 184 Misc. 213, 53 N.Y.S. 2d 255 (Sup.Ct. 1945), *aff'd,* 270

Realizing the potential loophole available to itinerant criminals, the court declared that holding otherwise would defeat the purpose of the multiple offender statutes and open New York to out-of-state offenders with long criminal records who would immigrate to New York assured of first offender status.[30] Furthermore, there was no mention of the Pennsylvania penal statutes in the entire opinion.

In the *Dacey* case, the district attorney had filed an information, after defendant's conviction charging him with having been previously convicted of a felony larceny in Massachusetts in 1931. The defendant objected to the use of this prior conviction to increase his punishment, contending that the Massachusetts larceny statute embraced certain situations which would not be felonies in New York, although considered felonies in Massachusetts.[31] The defendant had pleaded *nolo contendere* [32] to the Massachusetts indictment and was convicted. The court, dismissing this objection, held the test to be whether defendant was convicted of a crime, which, if committed in this state would be a felony, not what it could have been by any possibility.[33] Since de-

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App. Div. 877, 62 N.Y.S. 2d 528 (1946), *aff'd,* 296 N.Y. 954, 73 N.E. 2d 265 (1947) (upholding prior conviction under similar Mass. statute). *Contra,* People v .Connor, 182 Misc. 455, 46 N.Y.S. 2d 19 (Jefferson County Ct. 1944) where court refused to consider prior conviction obtained in Mass. under waiver of indictment.

[30] People v. Wicklem, *supra* note 17, at 644, 53 N.Y.S. 2d at 93.

[31] This claim is the commonly repeated contention of multiple offenders since People v. Olah, *supra. E.g.,* Matter of Moore v. MacDuff, 309 N.Y. 35, 127 N.E. 2d 741 (1956) (proceeding under VEHICLE AND TRAFFIC LAW § 71, subdiv. 2, par. (b) for revocation of drivers operator's license on basis of previous foreign conviction for drunken driving. The Canadian statute defining drunken driving included the words, "impaired by alcohol or drugs," whereas the applicable New York statute said, "under the influence of alcohol." Although petitioner pleaded guilty to a Canadian charge of driving while impaired by alcohol, the court reinstated his license because the Canadian statute embodied the additional element of drugs, not included in the New York statute.

[32] It is settled law in New York that pleas of *nolo contendere* or *non vult* obtain the same result as a guilty plea. See People v. Daiboch, 265 N.Y. 125, 191 N.E. 859 (1934).

[33] People v. Dacey, *supra* note 17, at 838, 3 N.Y.S. 2d at 168.

fendant was convicted under an indictment alleging the theft of a value of over one hundred dollars which is a felony in New York, the Massachusetts conviction was sufficient for purposes of punishment as a multiple offender. The Massachusetts larceny statute employs language so broad that it describes three separate New York crimes.[34] Nevertheless, the court determined that the foreign judgment of conviction and the allegations contained in the indictment were conclusive, with the result that the court deemed itself confined to the facts charged in the indictment.

Likewise, in a similar situation the court in *People v. Voelker*[35] declared: "In such a proceeding (multiple offender) the court is confined to the facts charged in the indictment upon which the previous conviction was had."[36] Thus, prior to the *Olah* rule,[37] the formula consistently utilized in decisional law to classify the crime in New York related to the defendant's acts as alleged in the previous foreign state indictment and judgment of conviction.

The cases decided after *Olah* reach a quite different result, administering the multiple offender laws in conformance with the *Olah* doctrine. These cases reveal the exploitation of the loopholes created under the *Olah* rule by the persistent offender and the fallacies inherent in the "statute" test.

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[34] Larceny, embezzlement and obtaining money under false pretenses. There are possible situations under New York law where obtaining money under false pretenses would only constitute a misdemeanor.

[35] 222 App. Div. 717, 225 N.Y.Supp. 883 (1927).

[36] *Id.* at 717, 225 N.Y.Supp. at 883. This is true although the defendant may have pleaded "not guilty" to the previous indictment as long as he was later found guilty since the jury would have found him guilty of the indictment as charged.

[37] It is interesting to note that the earlier courts were quite severe as compared to modern courts in their treatment of the persistent offender. See *Matter of Cedar, supra* note 24 (defendant was sentenced as a recidivist on the basis of a prior foreign larceny of $400; later the foreign court amended their indictment to charge a theft of only $35. The New York court refused to go behind the acts alleged in original indictment and upheld the increased punishment); People v. Youngs, *supra* note 1 (life imprisonment for second offender). See also, N.Y.Sess. Laws 1829, 2 Rev. Stat. 699 § 10 (life sentences for second offenders).

In 1951, three decisions[38] were handed down which illustrate the destructive results following this breach in the multiple offender statutes. *People v. Gailhard* concerned an application by the defendant for a writ of error *coram nobis* to review his sentence as a fourth felony offender in 1948. One of his prior larceny convictions was obtained under a Pennsylvania statute which provided that any person committing a larceny is guilty of a felony regardless of the amount of property stolen. On the basis of *Olah,* defendant claimed successfully that a conviction under this larceny statute could not be considered a felony in New York under sections 1941 and 1942 of the Penal Law. The court decided that the defendant was improperly sentenced as a multiple offender on the basis of the *Olah* rule, even though the Pennsylvania indictment which resulted in defendant's conviction stated that he had feloniously stolen property of the value of over two hundred and fifty dollars.

People v. McDowell presents a similar situation. There the defendant had been sentenced as a second offender under section 1941 in the year 1945. But the defendant relying upon the *Olah* rule obtained resentencing as a first offender. His record showed a previous court martial conviction of assault with intent to resist lawful detention. The court concluded that the statute defining his previous crime[39] would only define a misdemeanor in New York and could not be the basis for a multiple offender conviction. The defendant's acts consisted of assaulting his jail keeper, tying and binding him and escaping lawful detention. These same actions, if committed in New York, would amount to the felony of assault with intent to avoid lawful detention.[40] The court in determining the degree of the previous foreign crime declared: ". . . [I]t is not the act committed there, which if done here would be a felony but rather the delineation of the statute creating and defining the crime that is determinative." [41]

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[38] People v. Gailhard, 278 App. Div. 712, 103 N.Y.S. 2d 203 (1951); People v. McDowell and People v. Zuccaro, *supra* note 24. It did not take the itinerant multiple offender very long to grasp the full significance of the 1950 *Olah* decision.

[39] 34 U.S.C.A., § 1200, art. 8, subdiv. 3 (Articles of the Government of the Navy). This statute prescribes punishment for any person who ". . . quarrels with, strikes, or assaults, or uses provoking or reproachful words, gestures or menaces toward any person in the Navy."

[40] NEW YORK PENAL LAW § 242, subdiv. 5.

In *People v. Zuccaro,* the defendant attacked his fourth-offender sentence on the grounds that one of his previous foreign convictions would not be a felony if committed in New York. He had one felony conviction in 1939 for receiving stolen property in New Jersey [42] but the statutes defining that crime do not specify any value, whereas in the New York statute (section 1308 of the Penal Law) defining the felony of receiving stolen goods, the value must exceed one hundred dollars. Although a sufficient value was stated in the foreign indictment to make out a New York felony, the court refused to count this conviction and considered the allegation of value in the indictment as mere surplusage, and of no consequence.[43]

After the lower courts had obtained some degree of consistency in the application of the *Olah* doctrine,[44] the New York Court of Appeals decided the case of *People v. Love,*[45] which reversed the lower court's interpretation of the principles embodied in the *Olah* decision. The defendant had previously been convicted of grand larceny in Alabama in 1935. The original court in an attempt to apply the "statute" test was unable to determine from the record and statute the degree of that Alabama crime, if it had been committed in this state and therefore held that the crime could not be counted as a felony for purposes of section 1942. The significant Alabama statute[46] embraced the crimes of robbery and larceny. The Alabama indictment stated, however, that defendant ''feloniously took . . . certain property from (the) person,'' words which describe a felony robbery in New York.[47] The New York Court of Appeals did not apply the ''statute'' test but considered only the facts alleged and admitted in the foreign indictment and determined that the Alabama crime would have been a felony in New York. The court specifically disclaimed any application of *Olah* to this situation but did not explain its action. The *Love* decision, along with several other lower court cases,[48] appears to disregard the *Olah* doctrine and the ''statute'' test, in favor of the acts criterion. The facts of the *Love* case show that the court of appeals did consider the acts as alleged in the foreign indictment to determine that case.

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[41] People v. McDowell, *supra* note 24, at 48, 105 N.Y.S. 2d at 972.

[42] N.J. STAT. ANN. § 2:145–6, 2:164–3.

[43] People v. Zuccaro, *supra* note 24, at 43, 108 N.Y.S. 2d at 100.

[44] In addition to cases cited in note 38, *supra,* see also People v. Adams, 205 Misc. 97, 124 N.Y.S. 2d 742 (Suffolk County Ct. 1953), where a North Carolina indictment alleging criminal acts sufficient to constitute a New York felony was struck down for any use under § 1941–2 because the foreign state statute defining the crime only corresponded to a New York misdemeanor.

[45] 305 N.Y. 722, 112 N.E. 2d 846 (1953).

Subsequent decisions, however, such as *People ex rel. Marsh v. Martin*[49] do follow the *Olah* doctrine to determine the status of the crime. The *Martin* case involved an interpretation of a Utah burglary statute[50] which described that felony offense in two ways; it could be committed by a forcible breaking and entering, or by a mere entry without force. The former acts would constitute a felony, if committed in New York but the latter only a misdemeanor.[51] The indictment to which defendant pleaded guilty specifically alleged a forcible breaking and entering in the precise words of the statute but the court in its application of the "statute" test determined that this conviction under the Utah statute, part of which did not require a breaking, would not have been a felony in New York.[52]

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[46] CODE OF ALABAMA, ch. 174, § 4905 (1923).

[47] Under NEW YORK PENAL LAW § 1290, 1296 subdiv. 2.

[48] In this connection see also People v. Tyson, 111 N.Y.S. 2d 469 (Kings County Ct. 1952) (court cited *Olah* but determined that the indictments and records of judgment in the foreign state, control). People v. Coleman, 283 App. Div. 875, 129 N.Y.S. 2d 199 (1954) (crime as disclosed by indictment). Both these cases appear to contradict the *Olah* rule.

[49] 308 N.Y. 823, 125 N.E. 2d 873 (1955). See also, People v. Swinson, *supra* note 23 (North Carolina indictment alleged that defendant did "break and enter." The burglary statute in that state employs the words *"break or enter"* to constitute felonies. Court refused to allow these convictions under § 1941–2 since corresponding New York statute requires a *"breaking and entering."* Court in reliance upon *Olah* considered the operative facts as stated in the statute enlarged and therefore of no consequence in the indictment). To the same effect see People v. Gifford, *supra* note 24 (Vermont larceny statute § 8304, defined felony larceny as a theft of $50 or more whereas New York requires $100; situation similar to *Olah* facts) and People v. French, *supra* note 7 (difference in amounts required to constitute a felony larceny between Mass. and New York statutes; conviction not allowed under § 1941).

[50] UTAH CODE ANN. § 76–9–3.

The above multiple offender cases decided during the 1954–1958 period conform in essential aspects to the principles embraced in the "statute" test as announced in *People v. Olah.* These courts continued to apply this formula, many times somewhat reluctantly [53] and other times incorrectly.[54]

A reasonable interpretation of the *Olah* decision would lead to the conclusion that the determination of the grade of the prior foreign offense is to be made by reference to the foreign statute creating and defining the crime without using the foreign indictment to enlarge or extend the statutory definition of the crime. However, this interpretation appears difficult to reconcile with the most recent decision of the court of appeals on this issue, *People ex rel. Gold v. Jackson.*[55] The *Gold* case concerned a multiple offender who had been sentenced under section 1941 upon an information disclosing a prior Florida burglary conviction. The Florida statute [56] defined the crime of burglary alternatively as (1) a breaking and entering, or (2) a breaking out. The first act if committed in New York would be burglary in the third degree, a felony; but the other would only be unlawful entry, a misdemeanor.[57] The material facts alleged in the indictment charged a breaking and entering which would have been sufficient under New York law to constitute a felony for purposes of the recidivist laws.

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[51] NEW YORK PENAL LAW § 404–5.

[52] *Accord:* People v. Kromick, *supra* note 24, where the court reached the same conclusion with Maryland and Delaware burglary statutes. Compare with opinion of case in note 33, *supra*.

[53] People *ex rel.* Gold v. Jackson, 5 App. Div. 2d 456, 459, 172 N.Y.S.2d 399, 402 (1958), *rev'd,* 5 N.Y. 2d 243, 157 N.E. 2d 169, 183 N.Y.S. 2d 799 (1959).

[54] People v. Love, 280 App. Div. 804, 113 N.Y.S. 2d 669 (1952), *rev'd,* 305 N.Y. 722, 112 N.E. 2d 846 (1953).

[55] 5 N.Y. 2d 243, 157 N.E. 2d 169, 183 N.Y.S. 2d 799 (1959).

[56] FLA. STAT. ANN. ch. 811, § 811.01.

The appellate division experienced difficulty in the application of the *Olah* "statute" test to these circumstances. The lower court understood that the "statute" test prohibited any modification of the statutory definition of the crime by the operative facts as alleged in the indictment. Therefore, they felt obligated under the *Olah* rule to hold for the defendant because of the unlawful entry-misdemeanor element inserted in the language of the Florida statute. But the court of appeals reversed the lower court's holding and explained its own decision of nine years before as follows:

> The rationale of *Olah* does not license the courts below, in sentencing recidivists, to disregard the indictment or information upon which a conviction in a sister State is based in determining whether the crime charged therein constitutes a felony in New York. The intent and spirit of the *Olah* rule require that the courts abstain from considering the surplusage contained in the indictment. . . . Only those facts alleged in the indictment or information which are not operative or material under the applicable (foreign) criminal statute . . . are to be discounted. . . .[58]

Then the court unanimously concurred in the conclusion that since the Florida indictment alleged facts sufficient to make out a New York felony it could not be assumed that Gold had been convicted of only a misdemeanor, as suggested.

The *Gold* case and the previous decisions in the burglary cases of *People v. Kromick, People v. Swinson* and *People ex rel. Marsh v. Martin*[59] were similar in their fact situations but opposite results were reached. It is interesting to note that the court of appeals had decided the *Kromick* and *Martin* cases in 1955 and at that time applied the ''statute'' test to the entire exclusion of any consideration of the facts as alleged in the indictments.[60]

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[57] NEW YORK PENAL LAW § 404–5.

[58] People *ex rel.* Gold v. Jackson, *supra* note 53, 5 N.Y. 2d 243 at 245, 183 N.Y.S. 2d at 800, 157 N.E. 2d at 170.

[59] People v. Kromick, *supra* note 24; People v. Swinson, *supra* note 23; People *ex rel.* Marsh v. Martin, *supra* 23.

The question as to whether the *Gold* case is a modification of the *Olah* doctrine or a partial attempt to remove the loopholes resulting from the application of the ''statute'' test is unresolved. But, it can be said that the administration of the multiple offender laws has suffered from the confusion brought about by the lack of a clearly defined formula to determine the status of prior foreign crimes.[61] Then, also, the difficulty of interpretations and construction of the ''statute'' test presents itself. The *Olah* doctrine requires the determining court to consider only the operative and material facts in the indictment as defined by the penal statute.[62] What are the ''operative and material facts?''[63] Construing the *Olah* principles it would seem that any facts in the indictment outside the statutory language defining the crime are considered immaterial and surplusage,[64] but is this always true? [65] These important questions to which no precise and exact answer has been given hinder the effective application of the multiple offender laws.

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[60] Also undistinguishable is the *Love* decision when considered in relation to the other larceny cases such as *Olah, Gailhard, Zuccaro* and *Gifford.* See pages 179, 187, 188 and note 49 *supra.* This later group of decisions all concerned foreign state larceny statutes which required different monetary amounts from New York. Following the strict "statute" test, all of the prior convictions were disallowed under sections 1941–2. Had those courts applied the reasoning of *Love* or *Jackson* and considered the applicable indictments which all alleged sufficient values recidivist convictions would have resulted in every case.

[61] For example compare the opinion in People *ex rel.* Newman v. Foster, *supra* note 14 at 30, 74 N.E. 2d at 225 with the opinion in People v. Olah, 300 N.Y. 96 at 99, 89 N.E. 2d 329 at 331. See also comments in People *ex rel.* Gold v. Jackson, *supra,* pp. 190–191 and note 58 *supra.*

[62] See p. 180 *supra* and also People v. Olah, *supra* note 61, at 99, 89 N.E. 2d at 331.

[63] The appellate division in People v. Olah, 275 App. Div. 319 at 322, 89 N.Y.S. 2d 660 at 663 (1949), *rev'd,* 300 N.Y. 96, 89 N.E. 2d 329 (1950) contended that the nature and value of the amounts taken in larceny indictments are operative and material facts but the later decisions in sections 1941–2 larceny cases would say otherwise. (see note 60 *supra*).

[64] See note 13, *supra.*

Consequently, it seems that the lack of any well-defined standard or ''yardstick'' to measure foreign crimes and the resulting abuses of the recidivist laws, warrants remedial action by the legislature. Some standard should be enacted to measure crimes for the purposes of sections 1941 and 1942 which (1) would clearly set out the test or formula to be employed, and (2) would result in the least inequality to the persistent offender but obviate the loopholes in the present law.

Several solutions to this problem of prior foreign crimes have been employed by the different states.[66] Many states accord the foreign conviction the same weight as their own convictions.[67] Others prefer to base the extent of the foreign crime upon the amount of punishment prescribed for that offense in the foreign jurisdiction.[68] Still other states have enumeration statutes which list the various crimes they consider to be felonious and avoid the judicial classification problem.[69]

It may well be that the difficulties involved with administration of the ''statute'' test would warrant measuring the foreign crime by the punishment allotted, but the inherent inequities in such a system caused by the absence of uniform state penal laws make a solution along this line undesirable. The most practical standard and the most just approach would be to determine the acts committed in the foreign state and measure them against the law of New York.[70] This criterion had been utilized by the New York courts prior to the *Olah* decision and was the basis for the *Newman* decision.[71]

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[65] Consider the *Love* and *Jackson* decisions *supra,* which upheld recidivist sentences on basis of other language in the indictments.

[66] See 2 LA. L. REV. 177 (1939) which discusses the problem and the techniques utilized by the various states to determine the status of foreign convictions.

[67] MASS. ANN. LAWS ch. 279, § 25 (1956).

[68] MO. ANN. STAT. ch. 556, § 556.290 (Vernons 1949), imprisonment in state prison. New York has for years employed the "maximum punishment" test to determine the grade of the offense when committed *within* this state. See Mairs v. Baltimore & Ohio R.R. Company, 73 App. Div. 265, 76 N.Y.Supp. 838 (1902), People v. Lyon, 99 N.Y. 210, 1 N.E. 673 (1885) and People v. Van Steenberg, 1 Parker, Cr. R. 39 (N.Y. O.&T. 1845). The judiciary could very easily extend this punishment test to include foreign crimes, as well.

[69] ILL. ANN. STAT. ch. 38, § 602 (Smith-Hurd 1957).

Regardless of the approach employed, the impairment of the effectiveness of the multiple offender system consequent upon the *Olah* decision should cause the legislature to investigate sections 1941 and 1942 of the Penal Law with a view toward amendment. The loopholes in the present law which have allowed the "interstate" habitual criminal to avoid punishment as a multiple felony offender should be eliminated.

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[70] 18 KAN. B. A. J. 354 (1950). This test has been employed by most of the jurisdictions with recidivist laws similar to New York's.

[71] People *ex rel.* Newman v. Foster, 297 N.Y. 27, 30, 74 N.E. 2d 224, 225 (1947). This decision has never expressly been overruled. See also, note 17, *supra.*

Worthless Checks in Cash Sales: Rights of the Bona Fide Purchaser

The interest of the bona fide purchaser, obtaining personal property as a subvendee, is protected in either of two circumstances. First, the bona fide purchaser acquires an indefeasible title if his vendor, the original vendee, had title.[1] This is true even if the original vendee's title is a voidable one. Secondly, the bona fide purchaser obtains an indefeasible title where, although no title was passed to the original vendee, the real owner so clothed him with the indicia of ownership or authority to sell that the real owner will not be heard to deny or question the rights of those who deal on the faith of such appearances.[2]

The scope of this comment will be confined to the question of whether the original vendee had title. More particularly, this discussion will be limited to the issue of whether, in New York, payment by a "bad check" passes title to the original vendee in a cash sale. Throughout this discussion, the term "bad check" is used to mean a check which is dishonored upon due presentment either because of insufficient funds or because the supposed account is non-existent. The term does not include a forged check, which is distinguished in the discussion which follows.

In nineteenth century English case law, the bona fide purchaser seemed to be favored by the courts.[3] A distinction was drawn between obtaining goods by false pretenses and larceny. In the former case, it was held that the original owner intended to transfer title to his purchaser, so that a voidable title passed to the purchaser. The subsequent resale then passed good title to the bona fide purchaser. The English courts felt that the failure to protect the bona fide purchaser "would endanger the security of commercial transactions, and destroy that confidence upon which, what is called the *usual course of trade* materially rests."[4] (italics in original).

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[1] Casey v. Kastel, 237 N.Y. 305, 142 N.E. 671 (1932); N.Y. PERS. PROP. L. § 105. See also 77 C.J.S. *Sales* §296b (1952).

[2] Thompson v. Blanchard, 4 N.Y. 303 (1850). N.Y. PERS. PROP. L. § 104. See also 77 C.J.S. *Sales* §295f (1952).

[3] Parker v. Patrick, 5 T.R. 175, 101 Eng. Rep. 99 (K.B. 1793). See also Corman, *Cash Sales, Worthless Checks and the Bona Fide Purchaser,* 10 VAND. L. REV. 55–78 (1956).

The protection of the good faith purchaser in England was confirmed by statute. The Sale of Goods Act,[5] 1893, section 24(2) provides as follows:

> Notwithstanding any enactment to the contrary, where goods have been obtained by fraud or other wrongful means not amounting to larceny, the property in such goods shall not revest in the person who was the owner of the goods, or his personal representative, by reason only of the conviction of the offender.

The American Uniform Sales Act did not include an equivalent of section 24(2) of the English Sale of Goods Act.

Early New York cases,[6] in their dicta, indicated a desire to protect the bona fide purchaser. These cases suggested that a contract title reservation should be effective only between the original parties. However, in *Ballard v. Burgett*,[7] the court of appeals held that if the original vendor clearly reserves title in himself, no title passes to a subsequent purchaser in good faith. In this case, the original vendor delivered oxen to his vendee but stipulated they were to remain his property until paid for by the vendee. The vendee sold the oxen to the defendant who purchased in good faith without notice of the original vendor's rights. It was held that the original vendor could recover possession of the oxen.

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[4] Root v. French, 13 Wend. 570, 572 (N.Y.Sup. Ct. 1835).

[5] SALE OF GOODS ACT, 1893, 56 & 57 Vict., c. 71, §24 (2).

[6] Fleeman v. McKean, 25 Barb. 474 (N.Y. Sup. Ct. 1857); Beavers v. Lane, 6 Duer 232 (N.Y. Super. Ct. 1856).

[7] 40 N.Y. 314 (1869).

The Uniform Sales Act does not purport to decide the question under consideration. Section 23 states that if the original vendee has no title, he can convey none. Section 24 states that if the original vendee has a voidable title, he can convey an indefeasible title to a good faith purchaser. Thus, both sections presuppose a determination under existing state law as to whether the vendor has retained title.

Two rules have been developed in other jurisdictions in regard to payment by check and the rights of a bona fide purchaser.[8] One rule holds that there is no passage of title until the check given in payment clears. Typical of this rule is the California case of *Clark v. Hamilton Diamond Co.*[9] Here the original vendee made payment by check and obtained possession of a ring which he transferred to a good faith purchaser. The check was subsequently dishonored. It was held that the check was not received as absolute payment, and that the delivery of the ring to the original vendee was conditional. Since the check was dishonored upon due presentment, title to the ring remained in the original vendor.

The other rule holds that there is a passage of title as soon as payment is made by check. If the check is dishonored, the original vendor may regain title unless the goods have passed into the hands of a bona fide purchaser. Illustrating this rule is the Nebraska case of *Sullivan Co. v. Larson.*[10] The court held that where the vendee gave a bad check, a voidable title passed. The vendee, therefore, could transfer a good indefeasible title to a subsequent purchaser in good faith.

Williston is in agreement with the Nebraska rule. Speaking of the decisions holding that no title passes until the check clears upon due presentment, he says:

> It is submitted that such decisions are unsound. The reasoning upon which they rest is that a worthless check is no payment of the price, and the condition has not hap-

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[8] See *Annot.*, 54 A.L.R. 526 (1928); 31 A.L.R. 578 (1924).

[9] 209 Cal. 1, 284 P. 915 (1930).

[10] 149 Neb. 97, 30 N.W. 2d 460 (1948).

> pened on which the property was to pass. But the real question is, Did the seller assent to transfer the ownership in the goods; and it can hardly be doubted that he did. . . . If no title passed until the check was paid, the buyer would be a tortfeasor if he used the goods until the check was paid, even though there were ample funds in the bank to make the payment.[11]

One of the first cases in New York to shed any light on this problem was *Shipply v. People,*[12] decided in 1881. This case involved a worthless check coupled with misrepresentations as to the identity of the person presenting the check. The defendant arranged to have goods delivered by the original seller to an expressman for delivery to the defendant "COD." The defendant sent an accomplice posing as an expressman to pick up the goods. The defendant then obtained possession of the goods by giving a worthless check to his accomplice who left the check at the original seller's place of business. The court held that such conduct constituted a common-law larceny.

> The offense of larceny at common law is established by proof on the part of the prosecution showing that defendant obtained possession of the property by some trick, fraudulent device or artifice, *animo furandi,* with the intention at the time of subsequently appropriating it to his own use.[13]

The jury, it was said, was justified in finding that a fraudulent intent or scheme existed from the beginning, pervading the transaction, so that there was no delivery or parting with title by the original owner.

A landmark New York case is *Phelps v. McQuade.*[14] This case involved a lending of credit, but its underlying principles are also applicable to the case where payment in a cash sale is made by check. Here, the vendee falsely represented that he was someone else, a person of financial responsibility. Relying on these representations, the vendor delivered to him a quantity of jewelry upon credit. The appellate division applied the common-law larceny test to determine if title had passed to the vendee. Where such a larceny was committed, the thief acquired no title by his crime. Where it was not committed, at least a voidable title was passed. Therefore, where a common-law larceny occurred, the vendee could pass no title to a bona fide purchaser; but such bona fide purchaser will be protected even where the original vendee obtained the goods by fraud if the fraudulent act is a felony by statute only and would not be a felony at common law.

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[11] 2 WILLISTON ON SALES §346a (rev. ed. 1948).

[12] 86 N.Y. 375 (1881).

[13] People v. Miller, 169 N.Y. 339, 350, 62 N.E. 418, 421 (1902).

[14] 220 N.Y. 232, 115 N.E. 441 (1917), *affirming* 158 App. Div. 528, 143 N.Y.Supp. 822 (1913).

The court of appeals, while agreeing that the common-law larceny test correctly stated the law, preferred to rest its affirmance on other grounds. It said that whether title had passed should be determined by contract law principles:

> Where the vendor of personal property intends to sell his goods to the person with whom he deals, then title passes, even though he be deceived as to that person's identity or responsibility. Otherwise it does not. It is purely a question of the vendor's intention.[15]

Where the owner intends to pass title, although induced by fraud, good title passes. That was the situation in this case. The fact that statutory larceny, but not common-law larceny, was present was incidental according to the court of appeals.

The court distinguished the situation where the vendor delivers property to A believing he is contracting with B, who is allegedly A's principal. Here, no title would pass so as to protect the innocent purchaser.

The court also distinguished the situation in which the fraudulent representations are made by letter. In this situation, the vendor knows no one but the person whose name is written on the letter. No title passes, therefore, to the vendee and he can convey none to a subsequent purchaser.

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[15] *Id.* at 234, 115 N.E. at 442.

The question then arises under the *Phelps* case as to how the intent is to be determined when a "bad check" is given in a cash sale. The cases litigated in New York all involve either a forged check situation or a case where there was a "bad check" plus other fraudulent conduct such as to constitute a common-law larceny.

In *Amols v. Bernstein,*[16] the plaintiff brought an action of replevin to recover possession of a ring from the defendant pawnbroker, who was an innocent pledgee of the ring without notice and who had a lien on the ring by virtue of a loan. The plaintiff had sold the ring to one Mitchell who claimed to be a man named Gorey. As part payment, Mitchell gave plaintiff a check and showed him a card bearing the name Gorey Automobile Co., N. Y. The plaintiff called the bank, and the bank told him the Gorey Co. was good for more than the value of the check. When the check was presented to the bank for payment the plaintiff learned that it was a forgery. The trial court adopted the common-law larceny test and held that Mitchell obtained the ring by a fraudulent representation, device, or artifice with intent to appropriate it to his use. Therefore, it gave judgment for the plaintiff. The appellate term, upon the authority of the *Phelps* case, reversed and gave judgment for the defendant.

The appellate division reversed on the grounds that Mitchell's conduct was within the definition of common-law larceny, as well as statutory larceny which includes the obtaining of property by false pretenses in addition to those acts which constitute common-law larceny. The appellate division distinguished the *Phelps* case on the ground that in the *Phelps* case the vendor delivered possession upon the false representations and credit of the purchaser, while here Mitchell obtained possession by means of a forged check together with delivery of another ring to which he held no title. In essence, the court merely said that this case involved a common-law larceny while the *Phelps* case did not, without any consideration of the intent of the parties.

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[16] 214 App. Div. 469, 212 N.Y.Supp. 518 (1925).

It would appear that this case can be explained on the basis of the *Phelps* case, arriving at the result reached by the appellate division. The seller did not merely intend to deal with Mitchell, thinking him to be Gorey. Instead he made inquiries. He called the bank to check the credit of the Gorey Co. He entered the transaction looking to the credit of the Gorey Co., not to the individual credit of the person before him.

In *Brotchiner & Sons, Inc. v. M. Ullman, Inc.*,[17] the original purchaser tendered a forged check. Also he posed as the representative of a Canadian customer in whose name receipted bills were made out. The seller delivered goods to the purchaser as an agent to deliver them to the supposed principal in Canada. The vendee then sold the furs to the defendant by representing himself to be the person named in the receipted bills. It was pointed out that the defendant can not be said to have relied on the receipted bills given by the plaintiff to the imposter as an indication that the imposter was the owner of the furs. The bills indicated that the alleged principal in Canada, not the imposter, was the owner of the furs. The defendant could not be misled into believing that anyone other than the alleged principal was the owner of the furs. The court, in its opinion, adopted the reasoning of the *Phelps* case, and it avoided reliance on the common-law larceny test. It pointed out that it was clear that the plaintiff did not intend to sell, and actually did not sell, to the imposter. He merely entrusted him with possession of the furs for delivery to the person in Canada with whom the plaintiff thought he was dealing. The court went on to point out that the result would be different where the vendor, though induced by false statements of facts, actually intends to pass title to the vendee. Such a sale, though voidable by the vendor, passes title to the vendee, as in the *Phelps* case.

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[17] 141 Misc. 102, 252 N.Y.Supp. 244 (Sup. Ct. 1931).

In *Fowler v. Firth,*[18] the appellate division again referred to the common-law larceny test as the proper rule to apply. It was merely dictum, however, for the case involved a negotiable instrument and the question of whether the defendant was a holder in due course.

The case of *Damis v. Barcia*[19] seems, at first glance, to be a clear repudiation of the ''intention of the vendor'' rule. Here the buyer, inducing the sale of automobiles by false statements regarding both his identity and worth, paid with forged checks. Contending that the autos were obtained by trick and fraud constituting common-law larceny and that no title passes in such a situation, the appellate division held that when a forged check is given in a cash sale by the original vendee, no title passes from the original vendor. The court's holding appears to be based upon the arbitrary rule that title never passes when the original vendee commits a common-law larceny. A dissent was filed, which, relying on the *Phelps* case, argued that title had passed even though the seller was deceived as to the identity of the original vendee.

Although the majority opinion's disregard of the intention of the original parties and their return to the common-law larceny test seems to be contrary to the language of the *Phelps* case, it is submitted that the result which they reached is consistent with the principles enunciated by the court of appeals in the *Phelps* case.

The first point which should be noted is that the *Phelps* case involved the extending of credit by the seller to the purchaser, while the *Damis* case concerned a cash sale where a forged check was tendered as payment. In the dictum contained in the *Phelps* case, the court of appeals said that in a transaction conducted by letter, as opposed to a personal, face-to-face transaction, the vendor intends to sell to the person named in the letter as he knows no one else.

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[18] 253 App. Div. 146, 2 N.Y.S. 2d 360, *aff'd,* 278 N.Y. 683, 16 N.E. 2d 401 (1938).

[19] 266 App. Div. 698, 40 N.Y.S. 2d 107 (1943).

If, instead of a credit transaction, a cash sale is intended, and payment is actually made in cash, there is no problem of intention; title has passed. But, if a check is given in payment in place of cash, the situation is analogous to a transaction by letter in a credit sale. The check stands in the place of cash. It represents cash. The vendor is not principally concerned with the credit of the person standing before him; he is concerned with the credit of the person whose name appears on the check, which he is accepting as cash. In essence, he knows no one except the supposed maker of the check. Since he only intended to pass title to the person named on the check, and the one who executed the check was not that person, no title passed from the vendor. In the forged check case, therefore, the original vendor will prevail over the bona fide purchaser from the original vendee.

It is submitted that the mere "bad check" case is different, and the bona fide purchaser should be protected. Here again, the check is accepted in the place of cash. The original vendor relies upon the credit of the person supposedly signing the check. But in this case he receives precisely what he intended. The name on the check and the original vendee are one and the same. The original vendee, therefore, is the person to whom the original vendor intended to pass title. Having at least a voidable title, the original vendee can pass an indefeasible title to a bona fide purchaser.

The original vendor will not be heard to deny the title of the bona fide purchaser. It was the original vendor who agreed to accept the check for cash. It was the original vendor who failed to inquire as to the worth of his vendee's check.

The case of *I-Land Auto Sales v. Valle*[20] might be properly cited here as suggesting the unconditional nature of a check. Here the plaintiff was a used car dealer who traded to one Grant a 1953 Ford station wagon plus 400 dollars in exchange for a 1952 Cadillac automobile. The plaintiff gave Grant a check with the understanding that Grant would deposit it in his bank in North Carolina until the ownership of the car Grant traded in could be checked. The next day, the plaintiff discovered that the automobile had been stolen. Later, Grant traded the station wagon at the defendant's used car lot for a jeep and fifty dollars. The defendant had no knowledge of the prior transaction. This action was to recover the station wagon or its value due to conversion. It was the plaintiff's contention that Grant obtained a conditional title to the car, and, since the condition was not fulfilled, the title was voided when the plaintiff learned that the car Grant traded in had been stolen. The only condition that the plaintiff had attached, however, was that the purchaser should deposit the check in his bank. There was nothing in any document executed by the plaintiff to indicate that the delivery of the Ford was conditioned upon any subsequent event. The car had been obtained by fraud, but it had not been stolen.

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[20] 12 Misc. 2d 1091, 175 N.Y.S. 2d 732 (N.Y. Munic. Ct. 1958).

In conclusion, it may be said that the question of the passage of title between the vendor and the vendee of personal property is to be determined by the intention of the vendor. Did he intend to transfer title to his vendee or to someone else? It is submitted that in a cash sale where payment is made by means of a "bad check," it is the intention of the original vendor to transfer at least a voidable title so that the original vendor should not recover the goods if they have passed into the hands of a bona fide purchaser.

ALVIN H. FRITSCHLER

Recent Decisions

CONSTITUTIONAL LAW—MOTION PICTURE LICENSING STATUTE—VALIDITY OF

In *Kingsley International Pictures Corp. v. Regents of the University of the State of New York,* 360 U.S. 684 (1959), the Supreme Court decided that it is unconstitutional to ban a motion picture from public exhibition on the ground that it portrays acts of adultery as desirable, acceptable or proper patterns of behavior. As a result of this decision, the Court has severely limited the states' power to protect its citizens from the deleterious effects of salacious materials.

Section 122 of the New York Education Law provides that the motion picture division of the Education Department shall examine every motion picture submitted to it and issue a license for its exhibition "unless such film or a part thereof is obscene, indecent, immoral, inhuman, sacrilegious, or of such a character that its exhibition would tend to corrupt morals or incite to crime." In response to the Court's ruling in *Commercial Pictures Corp. v. Regents of the University of the State of New York,* 346 U.S. 587 (1953), that the term "immoral" is too vague, section 122-a was added to the Education Law to define an immoral film as one which expressly or impliedly presents acts of sexual immorality as "desirable, acceptable or proper patterns of behavior."

These provisions were applied by the New York Education Department in denying a license for the exhibition of the film "Lady Chatterly's Lover." Upon review the Board of Regents upheld the determination of the Education Department on the ground that the film portrays adultery as a desirable, acceptable and proper pattern of behavior. The New York Supreme Court, Appellate Division, reversed the ruling of the Regents in 4 App.Div.2d 348, 165 N.Y.S.2d 681 (1957). The New York Court of Appeals, reversed the decision of the appellate division, and upheld the Regents' refusal to license the film for exhibition. 4 N.Y.2d 349, 151 N.E.2d 197, 175 N.Y.S.2d 39 (1958). On appeal the Supreme Court unanimously reversed the court of appeals. Five members of the Court felt that since the statute, as interpreted by the New York courts, required the administrator to ban a film which portrayed acts of adultery as desirable patterns of behavior without reference to the method of portrayal, the result is to condone the suppression of the free expression of an idea.

The Court was content to reverse on the ground that the film was nothing more than a somewhat unusual, and rather pathetic, "love triangle, lacking in anything that could properly be termed obscene or corruptive of the public morals by inciting the commission of adultery." 360 U.S. at 708.

The result reached in this case was anticipated by the fact that not a single motion picture censoring statute has been upheld by the Court since 1952, when, in *Joseph Burstyn Inc. v. Wilson,* 343 U.S. 495, it was decided that motion pictures are entitled to the protection of the first amendment. The *Burstyn* case overruled *Mutual Film Corp. v. Ohio Industrial Commission,* 236 U.S. 230 (1915), which held that censorship of motion pictures did not give rise to a constitutional issue under the first and fourteenth amendments, since motion picture exhibition was purely a commercial spectacle. However, in 1948, the Supreme Court by way of dictum in the case of *United States v. Paramount Pictures Inc.,* 334 U.S. 131 (1948), said that the logic of the contention in the *Mutual Film* case was no longer tenable in the light of the industry's growth. In the *Burstyn* case the New York Board of Regents ordered the Commissioner of Education to rescind the license to show a film entitled "The Miracle" under authority of a statute which required the banning of a film which was sacrilegious. The Supreme Court, in passing on the ruling of the Regents, stated that motion pictures are within the ambit of protection which the first amendment, through the fourteenth, secures to any form of "speech" or the "press."

Accordingly, the Court has struck down every motion picture censoring statute considered since 1952. In *Gelling v. Texas,* 343 U.S. 960 (1952), a municipal ordinance which permitted the banning of motion pictures which were prejudicial to the best interests of the community was struck down by the Court as unconstitutional. In *Superior Films v. Department of Education,* 346 U.S. 587 (1953), an Ohio statute which permitted the banning of a movie on the ground that it was "harmful" was declared unconstitutional on the basis of the *Burstyn* case. Similarly, in *Commercial Pictures Corp. v. Regents of the University of the State of New York,* 346 U.S. 587 (1954), decided with the *Superior Films* case, the Court reversed the New York Court of Appeals when the latter confirmed an administrative agency's refusal to license a film entitled "La Ronde." In that case the Court decided that section 129 of the Education Law was too vague as a basis for banning this movie on the grounds that it was "immoral" and would "tend to corrupt morals."

However, the Court has continuously reiterated in a series of related cases that censorship statutes are not ipso facto unconstitutional. The Court in *Near v. Minnesota,* 283 U.S. 697 (1931), declared that all prior restraint on the publications of the press is not unconstitutional although it is to be carefully scrutinized. By way of dictum, it was said that the primary requirements of decency may be enforced against obscene publications. In that case, however, the Court held that a statute permitting the abatement, as a nuisance, of a malicious, scandalous, or defamatory periodical was unconstitutional as a prior restraint on the freedom of the press. In *Chaplinsky v. New Hampshire,* 315 U.S. 568 (1942), the Supreme Court said that the suppression of certain well-defined and narrow classes of speech, including loud and obscene utterances, would not raise any constitutional problem. Finally, in *Roth v. United States,* 354

U.S. 476 (1951), the defendant was convicted of mailing obscene circulars and advertising, and an obscene book, in violation of a federal statute. As to whether this statute was a violation of the first amendment, the Court held that obscenity was not within the area of constitutionally protected speech or press, and affirmed the defendant's conviction.

These cases, taken together, point to the conclusion that there remains some room for the states to legislate to prevent a malicious abuse of mass media, particularly the motion picture, under the guise of free expression and the first amendment. In the *Kingsley* case seven of the nine Justices clearly imply this conclusion. Only Justices Douglas and Black would disallow any and all forms of censorship. The majority opinion of the Court in the *Kingsley* case seems to ignore the statements of Judge Conway, of the court of appeals, to the effect that the scope of section 122-a is broad enough to include not only the mere expression of opinion, but also the espousal of sexually immoral acts (here adultery) *plus* actual scenes of a suggestive and obscene nature. A film which espouses adultery need not include scenes of this nature, in which case the statute would not properly be invoked to refuse to issue a license. The danger to public morality which must justify this legislation arises only when the idea sought to be presented becomes visually impressed upon the viewer's mind by means of actual scenes of a suggestive and obscene nature. It is in this situation that the statute is intended to apply.

Furthermore, even if the court of appeals' interpretation of the relevant statute allowed for the suppression of the idea of adultery, the Supreme Court has long recognized that the first amendment will not protect free expression when it presents a ''clear and present'' danger of substantive evil to the community, *Bridges v. California,* 314 U.S. 252 (1941). Judge Conway's opinion presents a convincing argument in support of the ''clear and present'' danger to the community in allowing exhibition of movies which advocate acts and deeds by their very nature illegal and immoral.

If Justice Clark's contention that the provisions of sections 122 and 122-a are too vague and indefinite to satisfy the due process clause is to be accepted, it is difficult to conceive of any statute which would be sufficient. Section 122-a was enacted specifically to overcome this objection after the Court in the *Commercial Pictures* case decided that the phrases ''immoral'' and ''would tend to corrupt morals'' were unconstitutionally vague.

The *Kingsley* case presents a good summary of the Supreme Court's position on censorship legislation. The Court's opinion indicates that statutory provisions for the banning of films which are clearly obscene as appealing solely to man's prurient interest are constitutional. A statute allowing for the censorship of films presenting an immediate and determinable menace or ''danger'' to the community would probably likewise be upheld by the Court. Apart from these two exceptions it is likely that all state pre-censorship of motion pictures will cease, and the prospects of an uncensored motion picture industry are not unlikely. It is only conjecture to predict the result of uncensored operation of a nationwide industry, but it is clear that the possibilities of this result demand careful consideration.

B.P.W.

CRIMINAL LAW—PRIVILEGE AGAINST SELF INCRIMINATION—INVALIDITY OF IMMUNITY STATUTE AS APPLIED TO PROSPECTIVE DEFENDANT

Section 2447 of the Penal Law which prescribes the method by which immunity may be conferred upon a witness appearing before a criminal proceeding was held to be unconstitutional as it applies to a prospective defendant appearing, pursuant to a subpoena, before a grand jury. *People v. Steuding,* 6 N.Y.2d 214, 160 N.E.2d 468, 189 N.Y.S.2d 166 (1959).

The factual situation pertinent to this decision was that the respondent was subpoenaed to appear as a witness before the extraordinary grand jury which was investigating official corruption in Ulster County. The respondent whose activities were the target of the investigation was sworn and fully advised that the grand jury was not conferring any immunity upon him. He was further informed that any testimony he gave might be used against him in a subsequent criminal proceeding and that he had a constitutional right to refuse to answer any question he believed to be self-incriminating. Thereupon the respondent, declaring he had full knowledge and a complete understanding of his constitutional rights, was questioned and gave testimony without refusing to answer on the grounds of self-incrimination. As a result of the testimony given, he was indicted for conspiracy to bribe public officers and of giving a bribe to such officers. The respondent, in an effort to have the indictment dismissed, contended that even though he gave testimony without invoking his privilege he automatically, by refusing to sign a waiver of immunity, obtained immunity when he appeared before the grand jury under the compulsion of a subpoena.

Prior to the enactment of this section, the rule in New York was that if the investigation before a grand jury was directed against the subpoenaed witness and he refused to sign a waiver of immunity but, notwithstanding such refusal, was examined and gave incriminating testimony, he automatically obtained immunity as to such testimony, and no indictment could be based thereon, though he made no claim of privilege. The courts took the view that to require him to attend a proceeding before a grand jury was a violation of his constitutional rights as set forth in the N. Y. CONST. art. I, § 6. *People v. Ferola,* 215 N.Y. 285, 109 N.E. 500 (1915); *People v. Gillette,* 126 App. Div. 665, 111 N.Y.Supp. 133 (1908); *People v. Bermel,* 71 Misc. 356, 128 N.Y.Supp. 524 (Sup. Ct. 1911).

In examining this rule it is important to note that in the past a distinction was made between a mere witness and a prospective defendant, for if the individual appearing before a grand jury were categorized as a mere witness, *i.e.,* one against whom the investigation is not directed, blanket immunity would not automatically be conferred unless the witness could bring himself within one of the more than twenty-five immunity statutes which did not require the witness, prior to the enactment of section 2447, to claim his privilege. If the witness did not come within one of these statutes, he could refuse to answer any questions tending to incriminate him; but if the witness failed to claim his privilege, the testimony given could be the basis of an indictment. However, there was no distinction drawn between the status of a witness and of a prospective defendant if there was an applicable immunity statute: in either case the testimony automatically carried immunity with it.

Section 2447 of the Penal Law, in providing a new procedure in dealing with a prospective defendant and a mere witness, requires that before immunity may be obtained in any investigation or proceeding where, by express provision of statute, immunity may be conferred, the following steps must be taken: (1) the witness must claim his privilege against self-incrimination; (2) he must be directed by competent authority such as a grand jury to testify, notwithstanding his claim of privilege; and (3) he must testify.

Before analyzing the court's decision in the *Steuding* case, it is of interest to note the similarities and differences that exist between the views taken by the federal and New York legislative bodies and courts in regard to self-incrimination and immunity. Both the federal and state constitutions contain provisions against compelling an individual to be a witness against himself. U.S. CONST. amend. V; N.Y. CONST. art. I, § 6. The historical derivation of this principle stems from a reaction against the practices which occurred in England, prior to the settlement of the British Colonies, of forcing the disclosure of incriminating facts from the accused. Dixon, *The Fifth Amendment and Federal Immunity Statutes,* 22 GEO. WASH. L. REV. 447 (1954). The framers of the Constitution of the United States included the self-incrimination clause thinking it was better for an occasional criminal to escape punishment than to allow the prosecution to build up a criminal case with the assistance of forced disclosures by the accused. As a matter of course, New York adopted a similar provision in 1846.

In order to facilitate the government's legitimate need and right to obtain the necessary information required to properly carry out its functions and at the same time to safeguard the constitutional rights of the witness, many immunity statutes have been enacted. A statute compelling the witness to testify in exchange for immunity from prosecution removes his privilege against self-incrimination, the theory being that one is not a witness against himself if the threat of prosecution is eliminated for crimes about which he is compelled to testify. *Brown v. Walker,* 161 U.S. 591 (1896); *People v. Cahill,* 126 App. Div. 391, 110 N.Y.Supp. 728 (1908), *aff'd,* 193 N.Y. 232, 86 N.E. 39 (1908); However, if the legislature is constitutionally to authorize the compulsion of testimony, the immunity granted must be complete—it must be as broad as the privilege it replaces. *Counselman v. Hitchcock,* 142 U.S. 547 (1892); *People ex rel. Lewisohn v. O'Brien,* 176 N.Y. 253, 68 N.E. 353 (1903).

The application of the *Gillette* rule and the enactment of immunity statutes conferring complete immunity prior to the time the subpoenaed witness testifies, has often led to abuses known as ''immunity baths.'' By receiving the guarantee of immunity the witness could volunteer answers disclosing criminal acts and thereby obtain freedom from prosecution. Because of this potential grant of absolution to persons later found to be criminals, it was recommended that steps be taken to preserve the usefulness of the immunity statutes but at the same time prevent their deliberate or inadvertent misuse. The procedure which was believed would obviate the possibility of an ''immunity bath'' was one that would require the witness, if he was to obtain immunity, to claim his privilege before giving testimony. By doing so the investigator would have opportunity to acquire facts necessary to adjudge whether or not the public interest would be better served by refusing to grant immunity and abandoning the inquiry, or to accord immunity in exchange for the testimony. H.R.REP. No. 2606, 83 Cong., 2d Sess. (1954); 3rd Report of N.Y. State Crime Comm., N.Y. Legis. Doc., 1953, No. 68, pp. 14–17, 26–29.

Even before the time of the recommended changes the question arose in many cases as to whether or not a claim of the constitutional privilege was a prerequisite for obtaining immunity from subsequent prosecution. Prior to 1933 most federal immunity statutes were silent as to the requirement of asserting a claim but between the years 1933–1942 in many regulatory statutes, Congress required that the privilege be expressly claimed by the witness before immunity could be established. The United States Supreme Court has taken the stand that under a statute not explicitly requiring a claim of privilege none was essential. *United States v. Monia,* 317 U.S. 424 (1943). On the other hand the constitutionality of statutes comparable to section 2447, in that the witness is required to assert his privilege before immunity may be conferred, have been upheld. *Ullman v. United States,* 350 U.S. 422 (1956); *Shapiro v. United States,* 335 U.S. 1 (1948).

The fact that the Supreme Court of the United States upheld the constitutionality of a statute such as the Immunity

Act of 1954, § 1, 68 Stat. 745 (1954), 18 U.S.C. § 3486 (Supp. II, 1959), which prescribes a similar procedural format for obtaining immunity as section 2447 which was declared unconstitutional by the court of appeals, may give the impression that the thinking of the two courts is compatible. The word ''witness'' finds common usage in both the federal and state statutes. It was previously noted that section 2447 was valid insofar as it applies to witnesses whose activities are not the target of the investigation. However, there is incompatibility in that the federal courts give no preferential treatment to witnesses being investigated by a grand jury—a mere witness and a prospective defendant are both categorized as witnesses and no effort is made by the courts to draw a line of distinction between them. This is true even though at the time the witness was subpoenaed it was probable that the grand jury would subsequently indict him. Therefore, the rule as pronounced in *People v. Gillette, supra,* applies only in a federal grand jury proceeding when the defendant has been formally charged prior to the time he is subpoenaed to testify before the grand jury. *Post v. United States,* 161 U.S. 583 (1896); *United States v. Kimball,* 117 Fed. 156 (C.C.S.D.N.Y. 1902); *United States v. Klein,* 124 F. Supp. 476 (S.D.N.Y. 1954).

Since the fifth amendment of the United States Constitution is not applicable to State proceedings, New York has a free hand in determining the extent of the protection against self-incrimination it will provide. *Adamson v. California,* 332 U.S. 46 (1947); *Twining v. New Jersey,* 211 U.S. 78 (1908).

The New York Constitution says nothing about claiming a privilege; it flatly prohibits compelling a person to be a witness against himself. N.Y. Const. art. I, § 6. As a matter of policy the New York courts in construing the meaning of this provision prior to the enactment of section 2447 stated that it was a violation of the prospective defendant's constitutional rights to require him to appear before a grand jury proceeding. *People v. Ferola, supra; People v. Gillette, supra; People v. Bermel, supra.* This being the judicial interpretation of the meaning of the constitutional prohibition against self-incrimination, the majority of the court in deciding the *Steuding* case rejected the idea that the change imposed by section 2447 was merely one of procedure and stated that this section was "unquestionably constitutional and valid, insofar as it is applied to witnesses who are, in truth and fact, witnesses." The court said: "The statute does not apply in terms to a defendant or to one who is in the shoes of a defendant, insofar as it provides that the burden is cast upon him of claiming privilege, and any attempt to invoke it against such a person would offend against the constitutional provision. . . . In other words, since the right granted by the Constitution is automatically conferred, section 2447 is ineffectual to destroy or curtail it and any attempt to do so must be stricken as unconstitutional." *People v. Steuding,* 6 N.Y.2d 214, 217, 160 N.E.2d 468, 470, 189 N.Y.S.2d 166, 168 (1959).

The violation of the respondent's constitutional rights gave the court grounds to dismiss the indictment; however, the opinion leaves open the question whether the violation of his constitutional privilege cloaks him with an immunity from prosecution for the crime for which he was indicted. He did obtain immunity as to such testimony improperly received before the grand jury so that it could not be the basis of an indictment. While this results in a dismissal of the indictment it does not preclude reindictment before another grand jury. *People ex rel. Coyle v. Truesdell,* 259 App. Div. 282, 18 N.Y.S.2d 947 (1940); *People v. Bermel, supra.* But immunity statutes such as section 381 and 584 of the Penal Law, prior to the enactment of section 2447, conferred blanket immunity to mere witnesses as well as prospective defendants; a witness who had not signed a waiver, automatically obtained immunity if he gave self-incriminating testimony, *People ex rel. Coyle v. Truesdell, supra,* and this immunity was conferred even though he did not claim his privilege. *People v. Sharp,* 107 N.Y. 427, 14 N.E. 319 (1887).

Since section 2447 of the Penal Law is not applicable to prospective defendants, if the respondent can bring himself within one of the immunity statutes such as sections 381 or 584 of the Penal Law, it would be reasonable to assume that the court can fulfill its policy with regard to giving adequate constitutional protection to a prospective defendant only by reverting to procedures in effect prior to 1954 and by doing so complete immunity must be accorded.

L. W. G.

CONSTITUTIONAL LAW—THE FIRST AMENDMENT AS A LIMIT ON THE INVESTIGATORY POWERS OF THE CONGRESSIONAL COMMITTEES

On June 8, 1959, the Supreme Court of the United States decided, in the case of *Barenblatt v. United States,* 360 U.S. 109 (1959), that when the personal freedoms of an individual are infringed by congressional investigating committees, the personal freedoms can be overcome. Prior to this, the Court had indicated that the first amendment does limit the power of investigation. This limitation was discussed in *Watkins v. United States,* 354 U.S. 178 (1956), and in *Sweezy v. New Hampshire,* 354 U.S. 234 (1956). The *Sweezy* case concerned a state investigation into subversive activities. Sweezy had refused to answer questions relating to a lecture which he had given, and also questions about his relationship with the Progressive Party. The Supreme Court noted that there had been a clear infringement of the first amendment, but the case was necessarily decided on the basis of the fourteenth amendment. In the *Watkins* case, the Court pointed out that the first amendment was a limitation on the investigating power of Congress, but the case was decided on the basis that Watkins had not been sufficiently informed of the subject matter of the investigation or the pertinency to that subject matter of the questions he did not answer.

The precise problem of first amendment rights as a limitation on the investigatory power of a subcommittee of the House Committee on Un-American Activities came before the Supreme Court in the case of *Barenblatt v. United States, supra.* Barenblatt had, prior to the service of summons, been a teacher of psychology at Vassar College. After the service of summons, but prior to his appearance, his four-year contract with Vassar expired and was not renewed. The petitioner came before the Committee as a private citizen without a job. The questions asked of Barenblatt related to the years 1947–1950 when he was a graduate student at the University of Michigan. He was accused by one Francis Crowley, a prior witness, of having been a member of Communist organizations during 1947–1950. Barenblatt was indicted and convicted under 2 U.S.C. § 192 (1938) which provides in part: "Every person who having been summoned as a witness by the authority of either House of Congress . . . or any committee of either House of Congress . . . refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor. . . ."

The questions that he refused to answer concerned his membership in the Communist Party and his association with known Communists and Communist organizations.

The main objections of the petitioner to this questioning were: "First, the compelling of testimony by the Subcommittee was neither legislatively authorized nor constitutionally permissible because of the vagueness of Rule XI of the House of Representatives, Eighty-third Congress, the charter of authority of the parent Committee. Second, petitioner was not adequately apprised of the pertinency of the Subcommittee's questions to the subject matter of the inquiry. Third, the questions petitioner refused to answer infringed rights protected by the First Amendment." 360 U.S. at 115, 116 (footnote omitted). Rule XI provides in essence that the Committee on Un-American Activities is to make investigations of un-American propaganda activities and the diffusion of propaganda that attacks the principle of the form of government as guaranteed by our Constitution. H. Res. 5, 83d Cong., 1st Sess. 99 Cong. Rec. 15, 18, 24.

In *Watkins v. United States*, 354 U.S. 178 (1956), the Court had the following to say about Rule XI: "Who can define its meaning . . .? What is that single solitary 'principle of the form of government as guaranteed by our Constitution'? . . . It would be difficult to imagine a less explicit authorizing resolution." *Id.* at 202. Mr. Justice

Black in his dissenting opinion (concurred in by Mr. Chief Justice Warren and Mr. Justice Douglas) maintains that this vagueness in the Rule still exists, and therefore the proceedings under the Rule should be declared unconstitutional, for the petitioner had no way of accurately applying the balancing test which the Court applies. In order to apply the test, the petitioner must know precisely what the interests of Congress are. It appears that the petitioner is being forced to guess as to the authority of the Committee and then risk paying the penalty under 2 U.S.C. § 192. It seems, as the dissent contends, that the petitioner is being unduly punished for not knowing the majority opinion before it was written—at least in so far as the majority relies on the so-called ''gloss of legislative history.'' It appears that Rule XI was too vague for the issue of pertinency in the *Watkins* case and yet, explicit as regards authority for the Committee to investigate Communism in the *Barenblatt* case.

On the point of pertinency the Court held that the petitioner had failed to properly raise the issue at the hearing. In order to raise this issue the witness must challenge the pertinency of the question at the time it is asked, or at least ask about the question in such a way that the Committee becomes aware that the witness does not see the pertinency of the question. As dictum, the Court points out that here pertinency was made clear. It appears from the following: 1. The subject matter of the inquiry had been identified at the commencement of the investigation. 2. Just prior to the petitioner's appearance the scope of the day's hearings had been announced. 3. The witness just prior to petitioner had identified petitioner as a member of an alleged Communist student organization at the University of Michigan while they both were students there. This dictum reaffirms the sources of information recognized in the *Watkins* case.

Rejection of the above contentions brought the Court to the first amendment issue. The Court said that this plea must be considered by a balancing of private and public interests in the particular circumstances shown. In view of this test it appears that the first amendment cannot have the same force as the fifth amendment in resisting inquiry. The result seems to be that one can have more protection because he might have committed a crime rather than a mere political error.

The Court found that Congress has wide power to legislate in the field of Communist activity. The exercise of this power is justified because of the Communist Party's purpose to overthrow the government by force if necessary. The Court also pointed out that it has in other cases refused to view the Communist Party as an ordinary political party. The Court then states that, where Congress has the power to legislate in the field of communism, it must have the investigatory power to make inquiries of persons who are communists. It is a necessary adjunct to the legislative function.

The petitioner contended that the investigation was not for the purpose of aiding legislation, but rather for the purpose of exposure. The Court had stated in the *Watkins* case, that there is no Congressional power to expose for the sake of exposure. Justice Black pointed out that the committee had many times made statements which indicated that it felt that its duty was primarily to expose communists and if possible have them removed from their jobs. In the appendix to the dissent there are some eleven specific statements of the Committee presented. *Barenblatt v. United States, supra,* at 163–66. The dissent felt that the same reports which are relied on to show a Congressional intent to investigate communism in education also show an intent to bring about exposure for its own sake or for the purposes of punishment. The Court, however, points out that the Committee was on its face set up to investigate, not to expose, and that the actions of the Committee were at least for the "primary purpose" of investigation. The Court seemed to extend its rule of not inquiring into the motives of Congress, and declined to inquire into the motives of the Committee. The Court in conclusion applied its balancing test and found that the individual interests of the petitioner were subordinate to those of the United States. In regard to the balancing test, it is to be noted that the Court does not stress the individual interests of the petitioner, but merely states that although the first amendment does reach and limit the Congressional investigations, the first amendment is not a protection in all circumstances.

What then remains of the first amendment in so far as it allows us to have our own beliefs and to associate with others in a peaceful manner? In speaking of the *Watkins* case, it was said in Comment, *Congress v. the Courts: Limitations on Congressional Investigation,* 24 U.CHI.L. REV. 740 (1956–1957):

> "The Court's holding that the First Amendment is applicable requires that eventually this problem [balancing legislative needs against private rights] be faced, and indicates that, even where a committee with a valid legislative purpose asks questions clearly pertinent to a precise authorizing resolution, there may still be First Amendment limitations on questions concerning the witness's political associations and beliefs." *Id.* at 751.

The Court has now faced the problem and it appears that where a case turns on a first amendment issue the critical element is the weight to be ascribed to the interest of Congress in demanding disclosures which infringe on the first amendment. *Barenblatt v. United States, supra,* at 126, 127. In the *Barenblatt* case, the Court indicated that had the subcommittee not purported to act in aid of legislation, but only for the sake of exposure, then the first amendment would have been of sufficient weight to justify the petitioner's refusal to answer, but the subcommittee would have been exceeding its authority under Rule XI and the constitutional issue would not have been raised. The *Barenblatt* case also indicates that if there had not been probable cause for belief that the petitioner possessed needed information the scales may have tipped in favor of the petitioner on the balance of interests.

In view of the need for probable cause it does not appear that the Court has opened the door to any wholesale infringements of the first amendment. The decision in *Barenblatt* is, however, a definite weakening of the personal freedoms guaranteed by the first amendment. In final analysis, where Congress has a valid interest in the field under investigation, the question is pertinent to the investigation, and there is probable cause for believing that the witness has needed information, then the first amendment protection, it appears, may not be available.

J.U.W.

EVIDENCE—ADMISSIBILITY OF CONFESSIONS

In *Spano v. New York,* 360 U.S. 315 (1959), petitioner surrendered voluntarily to the New York City police after an indictment for first-degree murder had been handed down by the Bronx County grand jury and a bench warrant for his arrest had been issued. Petitioner was accompanied to the station house at 7:10 p.m. by his attorney who advised him to say nothing. The questioning of petitioner, which lasted approximately eight hours, began after the attorney had left. Petitioner's request to call his attorney was met with the reply that the attorney's telephone number was not listed, when in fact it was. His subsequent requests for counsel were also refused. The police about 10:00 p.m. brought in one Bruno, a close friend of petitioner, to question him. Petitioner had originally called Bruno, a boyhood friend then in attendance at the Police Academy, when he wanted to surrender. Bruno was told to say that the call from petitioner had gotten him "in a lot of trouble" and that he should try, by arousing sympathy from the petitioner, to induce him to confess. Bruno pleaded with petitioner, mentioning the misfortune that would befall his family if petitioner did not confess. This subterfuge was used four times during the interrogation and was successful the fourth time. Petitioner agreed to confess at 3:25 a.m. At this time, petitioner had been confined and questioned for eight continuous hours by at least fourteen different persons. His sympathy had been falsely aroused by his supposed friend and his reasonable requests for counsel had been repeatedly refused.

In the New York Court of Appeals, a judgment of conviction was affirmed, three judges dissenting, *People v. Spano,* 4 N.Y. 2d 256, 150 N.E. 2d 226, 173 N.Y.S. 2d 793 (1958), 23 ALBANY L.REV. 176 (1959). The majority held that the confession was not coerced, either physically or psychologically, and that even if the petitioner had been illegally detained it was not a ground for vitiating the confession.

They ignored the question of whether the fact that the petitioner had already been indicted was of any importance. The minority felt that this was a confession extracted during a judicial proceeding. Further, they thought that the confession was a violation of the right against self-incrimination as it was made in the course of a criminal prosecution.

The United States Supreme Court, reversing, found that the use of this confession was in violation of the fourteenth amendment, having been obtained by "massive official interrogation." The use of petitioner's friend as a pawn seemed to be particularly obnoxious to the court, which concluded that petitioner's will was overborne by official pressure, fatigue and sympathy falsely aroused. The Court further felt that since the petitioner was already a defendant that there was no need for this investigation particularly since there had been an eyewitness to the crime. In a concurring opinion, Mr. Justice Douglas brought out the important point, only touched upon by the court of appeals, that petitioner had already been indicted and was not merely a suspect but actually a defendant in a criminal prosecution. Mr. Justice Stewart, concurring, felt that since a person is guaranteed counsel, and since the confession was used to procure a verdict sentencing petitioner to death, the very absence of counsel when the confession was extracted was enough to vitiate it under the fourteenth amendment.

The decision of the United States Supreme Court seems justified after an inspection of the record. Petitioner was not a mere suspect but in fact a defendant, since the grand jury had found enough evidence to indict him. The importance of this distinction was emphasized in an earlier Supreme Court decision, *Powell v. Alabama,* 287 U.S. 45 (1932), where it was said: ". . . [D]uring perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, . . . the defendants did not have the aid of Counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself.'' *Id.* at 57. The right to counsel extends to every step in proceedings against a defendant, and a state refusal of a request to engage counsel violates due process not only if the accused is deprived of counsel at trial, but also if he is deprived of counsel for any part of the pre-trial proceedings where such deprivation prejudices him. *Lisenba v. California,* 314 U.S. 219 (1941); *Wood v. United States,* 128 F. 2d 265 (1942).

In the dissent in the New York Court of Appeals, a further showing that perhaps the harsh New York rule will be changed is found in the reference to *People v. Perez,* 300 N.Y. 208 (1949), which intimated that if Perez had actually been a defendant instead of a material witness, and held without being allowed to see counsel, his confession might have been held inadmissible. This result suggests a possible trend away from the strict New York rule with respect to confessions.

In *People v. Spano, supra,* the dissent pointed out that petitioner was in the custody of the court for the sole purpose of pleading to the indictment and awaiting trial. The district attorney contended that petitioner's lawyer could have waited until the next morning, at which time petitioner would have been before the court. To say, however, that a man's rights would be different at 7:10 p.m. or 3:25 a.m. from his rights at 10:00 a.m. the following morning seems hardly consistent with sound ideas of due process.

The majority of the court of appeals in the *Spano* case stated that the confession was not coerced, but it seems difficult to justify this determination. In *People v. Farrell,* 2 App. Div. 2d 797, 153 N.Y.S.2d 284 (1956), it was said that coercion of any kind in obtaining a confession makes the confession worthless. Coercion can be psychological as well as physical, as was recognized in *People v. Spano, supra,* when the court of appeals used the phrase ''neither physically nor psychologically coerced.'' That the confession under consideration was psychologically coerced appears obvious by a reading of the record, and since it is well established that the fourteenth amendment prohibits the use of coerced confessions in state prosecutions, *Brown v. Mississippi,* 297 U.S. 278 (1936); *Watts v. Indiana,* 338 U.S. 49 (1949); *Fikes v. Alabama,* 352 U.S. 191 (1957), it would seem the Supreme Court might well have rested its decision on this ground alone.

The federal rule is that confessions made during an illegal detention are inadmissible, *Mallory v. United States,* 354 U.S. 449 (1952). This rule was not followed in New York because it was established on a basis other than the fourteenth amendment and was therefore not binding on the state courts. However, the *Spano* case, decided as it was on the basis of a violation of the fourteenth amendment, demands an almost necessary modification of the strict New York rule in future cases involving coerced confessions.

J. A. M., Jr.

EVIDENCE — MEDICAL TESTIMONY — EFFECT OF NARCOTICS ADDICTION ON VERACITY OF WITNESS

People v. Williams, 6 N.Y.2d 18, 159 N.E.2d 549, 187 N.Y.S. 2d 750 (1959), will probably give cause for reappraisal of the recognized limits placed on the admissibility of expert testimony. The physician who was called as a witness for the defense was questioned in general about the relation between addiction to narcotics and untruthfulness, and in the manner presented, his testimony was ruled inadmissible.

The defendant, Walter Williams, was convicted of a violation of the Penal Law, § 1751(1), for feloniously selling a narcotic drug to one Giles, a witness for the state. Giles testified to a telephone conversation which he had with the defendant Williams, in which Williams directed Giles to his home in East Elmhurst, Long Island. Giles went there, met the defendant and entered into negotiations for a sale of heroin. Williams sold Giles a package containing drugs for ten dollars and the promise of an additional like amount. Giles then left the house and returned to Manhattan, where he was apprehended by three detectives of the narcotics squad who had followed him from William's home. The package of drugs found on Giles' person and identified by him as the same one he received from the defendant was proven to be heroin and introduced as such without dispute on the trial. The police had tapped defendant's telephone after obtaining the proper authorizing order, and were able to testify to the conversation previously referred to. Aside from the actual meeting between the defendant and the witness, all other pertinent facts of the allegation could be verified by the members of the narcotics squad assigned to the surveillance of defendant's home.

It was proven on the trial that Giles had been addicted for more than five years to the daily use of heroin administered by intravenous injection, and it was shown that from the date of his arrest until the trial—a period of four months—Giles had received no injections of the drug. Counsel for defendant called a physician to testify to the relation of drug addiction on personality and veracity, with a view to discrediting at least the probative weight of the evidence given by Giles. The doctor was asked to give an opinion on the "characteristics" and the "personality changes" of an addict, and on whether a person addicted to drugs can testify in a normal manner. The trial judge requested an explanation of the purpose of these questions, and the case turned on the replies of counsel and their interpretation by the court. Counsel stated: "I want him to give us a medical opinion as to the characteristics of a person who is addicted to heroin as a mainliner," and added: "I submit I have a right to show this Jury by medical proof that a person such as Giles who is addicted to heroin, because of his condition, is not worthy of belief." Counsel finally defined his purpose as: "I'm not talking about credibility, your Honor, I'm talking about medical opinion." *People v. Williams,* 6 N.Y.2d 18, 22, 159 N.E. 2d 549, 552, 187 N.Y.S.2d 750, 753 (1959). At this critical point, and after continual objections by the state, the trial judge ruled that the witness' testimony was inadmissible on the issue of Giles' credibility, this being solely for the jurors to determine.

This case establishes that the testimony as presented was inadmissible since a proper foundation had not been laid by a showing that it represented the weight of medical opinion. Counsel's reasons for offering the evidence were somewhat ambiguous. The rule has long been that where an explanation is ambiguous, the offeror cannot avail himself on appeal of the construction more favorable to his case, unless it appears that such was the construction understood by the trial judge. *Daniels v. Patterson,* 3 N.Y. 47 (1849). See 6 CARMODY-WAIT, NEW YORK PRACTICE 540 (1952). From the record of the trial it seemed to be quite clear that the trial judge ruled consistently that the doctor could not testify as to Giles' credibility, indicating that he understood this to be the purpose of the line of questioning. The court of appeals was unanimous in deciding that if such was the inference to be drawn from counsel's declarations, the evidence was properly excluded. The question raised by the dissent is whether or not this was a fair inference, and whether or not the purpose as stated was ambiguous as a matter of fact. The majority felt that such evidence was inadmissible to show that heroin addicts are unworthy of belief without first establishing that this thesis is the weight of medical opinion, whereas the dissent felt that this was an indistinguishable and wholly arbitrary line to draw and was definitely prejudicial to the defendant.

There is considerable confusion about the admissibility of evidence in this area of narcotism. The difficulty seems to lie in the amount of evidence required to qualify the expert's opinion as representing the weight or consensus of medical authority. It would be inaccurate to say that this type of evidence has never been admitted before the courts of this country without first laying the groundwork required by this decision, but in the instances that this has occurred, there was usually an assumption that some remark of the expert had satisfied the requirement of establishing the profession's consensus. Other courts have admitted evidence concerning the various theories of the effect of narcotics addiction on the user's veracity. In the case of *State v. Fong Loon,* 29 Idaho 248, 158 P. 233 (1916), and in WHARTON & STILLE, MEDICAL JURISPRUDENCE § 1111 (3d ed. 1873), there is propounded what is commonly called the "dream-state" theory. In the *Fong Loon* case it was established that due to the euphoria produced by the use of narcotic drugs, the addict becomes incompetent to judge what is true and what is not.

The *Fong Loon* decision is noted by the defense in the principal case, because the court in that case did admit independent proof of the effect that use of drugs for a prolonged period of time would have on a witness' veracity and his ability to remember in general. There it seemed to be considered as a foregone conclusion that addicts are notorious and spontaneous liars. This idea is also adopted by the text in WHARTON & STILLE, *supra,* where it is indicated that a morphino-maniac's lying is "a sort of second nature." Here is perhaps the most direct case in favor of the defense's position, but it is not without some restrictions, as disclosed by subsequent cases on this point.

In *Kelly v. Maryland Casualty Co.,* 45 F.2d 782 (W.D.Va. 1929), the majority opinion considered this problem. The court dealt with a plaintiff's witness who was a user of morphine, and the defense introduced expert testimony that the use of this drug made people untruthful, cunning and generally unreliable. The evidence was rejected as insufficient to justify any weight being given it by the jury. The court discussed the *Fong Loon* case and admitted that while the constant use of morphine or other drugs may have a tendency to undermine the memory, it is anything but conclusive that the effect of such addiction is universal or even common. While the *Kelly* and the *Fong Loon* cases differ in the conclusion of the proposed consensus, they have a common ground in the recognition that the rule of evidence depends upon a scientific acceptance of the opinion about to be offered.

It seems that in the *Williams* case the trial judge interpreted the counsel's line of questioning as directed to proving that Giles' testimony was incredible because of a perversion of his character, based solely on the opinion of this witness; as such, the testimony was properly excluded. To establish a fact in issue it is not required of an expert witness that he demonstrate that most or all of the other experts in his field would agree with his opinion, but the majority of the court of appeals here felt that this testimony was anything but the usual type, especially since it was directed to establish the collateral issue of the witness' credibility.

Credibility is within the province of the jury alone. The judges here felt that it would be unwise to expand the settled and well-tested methods of impeachment, for the admission of such expert testimony may well have great impact on the jury and replace their judgment with the opinion expressed by this physician. The dissent emphasizes that if this testimony could have a bearing on a fact in issue then it is error to exclude it. By way of dictum in one New York case, *People v. Webster,* 139 N.Y. 73, 34 N.E. 730 (1893), the court of appeals referred to the "well-known" properties of a narcotic to "induce mental confusion," but the dictum has no bearing on the issue in the instant case and a search for grounds for the admission of evidence indicates that confusion may exist as to the interpretation in 3 WIGMORE, EVIDENCE § 934 (3d ed. 1940) which reads: "Any diseased impairment of the testimonial powers, arising from whatever source, ought also to be considered . . . accordingly, the morphine or other drug habit, in that it may have had such an effect should be received." Immediately following this, however, is the qualification that the author does not maintain that this is yet the wholly accepted practice of the courts, without restrictions similar to those directed by the majority opinion in the *Williams* case. Thus the statement may be interpreted to mean that when medical theory is reduced to at least the point of consensus, it may be introduced and received in evidence to offer the jury grounds for considering the testimony of the witness, but only in such collateral manner and not as a direct attack on the credibility of another witness.

Some courts have felt that the indiscriminate admission of this testimony would lead to a battle of the experts and tend by a conflict over collateral matters to obscure the main issues. In *State v. King,* 88 Minn. 175, 92 N.W. 965 (1903), and *Katleman v. State,* 104 Neb. 62, 175 N.W. 671 (1919), the court refused to admit such collateral material on the basis that it might tend to prejudice the jury, obscure the real issues and reduce the court to a sounding board for medical opinion.

It must be remembered that the rules governing the admissibility of evidence may work to the advantage of either party, and in an attempt by the state to impeach a defendant's testimony in the manner attempted by counsel in the *Williams* case it is reasonable to assume that counsel for the defense would use substantially the same argument to resist the attack as was used by the prosecution in the *Williams* case, and that a denial of the argument should be a ground for appeal. The law in the case is not startling, but definitive on the admission of this type of evidence. More likely than not the result is a just one, and in the future, before introducing an expert on similar untried theories, counsel would do well to read the opinions in the *Williams* case.

R. P. R.

FUTURE INTERESTS — POSSIBILITIES OF REVERTER ALIENABLE

Is a possibility of reverter alienable in New York? *Nichols v. Haehn,* 8 App.Div.2d 405, 187 N.Y.S.2d 773 (1959), has answered in the affirmative what the court felt had been an open question in this state. The problem of whether a valid inter vivos conveyance could be made of the interest remaining in the grantor upon the transfer of a determinable fee has long plagued the courts. The result has been a division of authority on the subject. Part of the uncertainty in New York has been attributable to the failure by the court of appeals in several leading cases to make a clear distinction between two different types of future interests: possibilities of reverter and rights of entry upon breach of condition subsequent.

The land in question was a strip extending across a tract formerly owned by Amasa and Huldah Starr as tenants by the entirety. In 1897 the Starrs deeded an interest in the strip to the Jamestown and Lake Erie Railway Company, already operating on the property. The conveyance contained the following provision:

> Said second party hereby agrees to and with said first party that in case said Railway shall at any time be abandoned then the lands heretofore described shall revert to the Grantors. . . .

Upon Amasa's death intestate, Huldah became owner in fee by right of survivorship and in 1906 she conveyed most of the property in the original tract to James Packard. Two exceptions in the warranty deed preceded the following statement: "This transfer is subject also to a conveyance made by Amasa J. Starr and Huldah E., his wife, to the Jamestown and Lake Erie R. R. Co. recorded in Liber 277 of deeds at page 304." The defaulting defendants, some answering defendants and one plaintiff claim under Packard.

A disturbing problem arose from the commencement of real property tax foreclosure proceedings, against the owners of the strip. By a resultant "deed" the Chautauqua Board of Supervisors purported to quit-claim the interest therein to the railroad receiver. Whether the instrument was a true tax deed or merely an acknowledgment of redemption by the receiver for the railroad would determine the interest vested in the answering defendants who were in privity by deed with the original railroad. A tax deed would create a new title cutting off subordinate claims in the plaintiffs, successors to the deceased Starrs.

The land continued to be used for railroad purposes until 1950 when the tract was abandoned and the equipment removed.

Both the plaintiffs and the answering defendants invoked Article 15 of the N.Y. Real Property Law to obtain an adjudication that they were the owners of an unencumbered fee. The plaintiffs alleged that the deed conveyed a determinable fee which automatically ended upon the railroad discontinuance and reverted to them as heirs of the original grantors. The answering defendants contended that the instrument created a conditional fee and any reentry rights were extinguished either by the attempted conveyance to Packard prior to the termination of the railway use or by the tax foreclosure deed. From this factual situation the court was faced with two main issues: the nature of the interest involved and whether the characteristics of this interest were conclusively established by New York decisional law.

The court of first instance granted the plaintiffs' motion for summary judgment but made a determination of the factual questions in the case. 8 Misc. 2d 780, 171 N.Y.S.2d 734 (Sup. Ct. 1957). It held, inter alia, that the deed to Packard was not an attempt to convey the possibility to him but merely apprised him of the existence of this future interest remaining in Huldah Starr. Thus, although it was intimated that the rules of non-alienability do not apply to rights of reverter, the court avoided a decision to that effect.

Upon the first issue, the appellate division affirmed the holding below that the Starrs conveyed a fee on limitation to the railroad which terminated upon the abandonment of the strip on the ground that the language of the deed clearly limited the duration of the estate. The court distinguished *Upington v. Corrigan,* 151 N.Y. 143, 45 N.E. 359 (1896), where the grantee had to build a church within a reasonable time, and *Nicoll v. New York and Erie R.R. Co.,* 12 N.Y. 121 (1854), where a railway was to be built within a specific time. In these cases the grantee had to perform a particular affirmative act in the future; in the case at bar the railroad had only to continue operating. When it failed to do so, the normal extent of the estate was reached and without any action on the part of the grantors it reverted to them by operation of law; whereas, in the above two cases dealing with conditions subsequent, a forfeiture of the estate could not occur until an entry was made by the grantors or their successors in interest. The court thus recognized the difference between the two types of estates.

The court then had to decide whether the right of reverter could be conveyed. If the trial term should decide that Huldah Starr did in fact intend to grant all her interest in the land, could the successors of Packard cut off the Starr heirs, not because of an extinguishment, but because there was no remaining interest in Huldah Starr? The court declared that the weight of authority favored alienability in keeping with modern property laws which foster marketability. Titles are obviously impaired by restrictions and outstanding interests which have become detached from the land benefited by the limitations. RESTATEMENT, PROPERTY, §§ 154–59 (1936), supports this view by including a possibility of reverter among reversionary interests which can be conveyed. The Restatement distinguishes those interests from rights of reentry which are not transferable. The court relied on several texts in its decision and was influenced by the decision of the Florida court in *Richardson v. Holman,* 160 Fla. 65, 33 So.2d 641 (1948). That court concluded that a second warranty deed of land conveyed as a determinable fee vested in the second grantee the possibility of reverter remaining in the common grantor. The Florida court declared that regardless of the common law rule, a right of reverter was alienable and devisable.

However, the court in the case under discussion had two court of appeals decisions in the *Upington* and *Nicoll* cases to overcome, as well as the subsequent pertinent New York cases, which together apparently committed this state to the minority view of inalienability. Examination of the *Nicoll* case discloses that the holding there was that a grantor of a conditional fee, having no remaining interest until a forfeiture of the granted estate occurs, can execute no conveyance until the condition is breached and a reentry is made. In speaking of this absence of a property right in the grantor of a conditional fee, the court said, "There is simply a possibility of reverter, but that is no estate. There is not even a possibility coupled with an interest, but a bare possibility alone." *Nicoll v. New York and Erie R.R. Co.,* 12 N.Y. 121, 132 (1854). From such statements, the distinction between the two interests, the possibility of reverter after a fee on limitation and the possible right of reentry upon breach of condition subsequent, became blurred. The interchange of terms explains the dictum that alienable future interests do not include the "possibility of reverter" which a grantor has after deeding a fee subject to a condition subsequent.

The *Nicoll* case has been cited as authority for the proposition that both rights of reentry and rights of reverter are inalienable, non-devisable and non-assignable. For example *Upington v. Corrigan, supra,* indicates an inclination to differ in reasoning with the courts which apparently settled the question. But the interest which the court in that case held to be inalienable was a right of reentry upon breach of condition subsequent, not a possibility of reverter. In discussing the contention that section 59 of the Real Property Law made reentry rights devisable the court confused the terms and implied that neither interest was descendable. Thereafter, such assertions as, "This possibility of reverter, this possible right of reentry, passes to the heirs not by descent but by force of representation . . .," were made in reference to conditional fees. *Trustees of Calvary Presbyterian Church v. Putnam,* 249 N.Y. 111, 115–16, 162 N.E. 601, 602 (1928).

The most recent case declaring a possibility of reverter inalienable is *Gorton v. Wager,* 149 N.Y.S.2d 887 (Sup. Ct. 1956), in which, apparently for the first time, a New York court pronounced upon that question in dealing with a determinable fee. The court cited the *Nicoll* and *Upington* cases as authority for saying that a ''possibility'' was not a reversion or an estate in land within the meaning of section 59 of the Real Property Law which made expectant estates descendable, devisable and alienable in the same manner as estates in possession. However, the statement in *Gorton v. Wager, supra,* was not strictly necessary to the decision, which was based upon estoppel by deed.

It would seem that the principal case is the first in which a New York court has held that possibilities of reverter as distinguished from rights of reentry can be conveyed. The decision has the merit of removing clouds on title and promoting the marketability of estates, a policy fostered by the legislature in passing the recording statutes, the statutes relating to perpetuities, and sections 345 to 349 of the Real Property Law.

A. R. C.

NEGLIGENCE—AUTOMOBILES—APPLICATION OF RES IPSA LOQUITUR

In *LoPiccolo v. Knight of Rest Products Corp.,* 7 App. Div.2d 369, 183 N.Y.S.2d 301 (1959), the court reversed an order of the trial court, setting aside a verdict for defendant as contrary to the weight of credible evidence, and entered judgment in favor of defendant dismissing the complaint.

Trucks driven by plaintiff and owned by defendant were involved in a head-on collision on the Manhattan Bridge. There were two eastbound lanes and one westbound lane on the bridge. Plaintiff's vehicle was travelling in the inner eastbound lane, defendant's in the westbound lane. The day was rainy, and the road surface, which was of steel ribbing with recessed concrete fill, was slippery. As a result of the impact plaintiff was thrown from his truck and sustained personal injuries. On the trial defendant offered medical testimony but no evidence on the question of liability. The sole testimony relating to the cause of the accident was offered by plaintiff, who testified that defendant's truck swerved into his but that he could remember no more. Another witness substantiated plaintiff's testimony.

Defendant's appeal was based on the argument that plaintiff had failed to make out a prima facie case under the rule of *Galbraith v. Busch,* 267 N.Y. 230, 196 N.E. 36 (1935), and that, in any event, the verdict should not have been set aside since the facts of the case did not require that the jury draw an inference of negligence. In the *Galbraith* case, a guest in a car was injured when it left the road and struck a tree. The evidence failed to show the cause of the sudden swerve, since the weather was clear and the road in good condition. It was held that res ipsa loquitur was not applicable since the accident could have occurred without legal wrong by the defendant.

The majority of the court in the *LoPiccolo* case observed that the fact that the road was slippery, due to the rain and steel-ribbed concrete construction, was a possible cause of the accident. This was said to preclude the application of res ipsa loquitur since there were circumstances other than defendant's negligence which would explain the event. Thus the *Galbraith* rule was extended to bring within its scope not only guest passengers but any party seeking to make out a prima facie case. The court also concluded that even had plaintiff established a prima facie case based upon res ipsa loquitur, it would not have provided such proof which the jury, in the absence of rebuttal, had to accept. Res ipsa loquitur was said to be but another species of circumstantial evidence which the jury could accept or reject. See *George Foltis, Inc. v. City of New York,* 287 N.Y. 108, 38 N.E.2d 455 (1941).

The dissenting opinion, written by Justice Bergan, maintained that to cross into plaintiff's lane so quickly defendant must have been going at an excessive rate of speed. The slippery condition of the road was said not to have been a sufficient cause of the collision. The dissent continued that to drive in the wrong lane was a technical violation requiring the defendant to offer a valid explanation. Justice Bergan felt that since the narrow doctrine of the *Galbraith* case, applying in a limited area, had not been extended by the court of appeals to include parties who are not guests it should not have been extended by the appellate division. The dissent concluded that the defendant should have rebutted plaintiff's evidence, and that since the weight of evidence on the whole record was in plaintiff's favor it was error for the trial court to set aside the verdict.

The *Galbraith* case has been followed in New York in *Cole v. Swagler,* 308 N.Y. 325, 125 N.E.2d 592 (1955); *Marinan v. Kronberger,* 280 N.Y. 640, 20 N.E.2d 1011 (1939); *Lahr v. Tirrill,* 274 N.Y. 112, 8 N.E.2d 298 (1937). However, all these cases involved guest passengers in suddenly swerving automobiles, and the *Galbraith* case suggests that if plaintiff had not been a guest, defendant would have had to come forward with his evidence or the doctrine of res ipsa loquitur would apply.

The majority's opinion that the jury was not bound to accept the inference in the light of *George Foltis, Inc. v. City of New York, supra,* appears sound. Although it might appear that the plaintiff had been dealt with harshly by the trier of the facts, the principle remains that the jury was free to reject the inference and could decide that the defendant was not negligent. If the trial judge were allowed to set aside the verdict, the inference would be made conclusive under the facts of this case.

K. E. N.

NEGLIGENCE — DEATH OF PRIZEFIGHTER — STATE NOT LIABLE AS EMPLOYER OF EXAMINING PHYSICIAN

The majority opinion of the New York Court of Appeals in the case of *Rosensweig v. State,* 5 N.Y.2d 404, 158 N.E.2d 229, 185 N.Y.S.2d 521 (1959), indicates that while a professional prize fighter must submit, under the rules of the state athletic commission, to regular examinations by a physician selected from a panel appointed by the commission, and while those physicians have the power to suspend him from the ring by a decision that he is physically unfit to fight, still there is no liability on the part of the state for negligence by the examining physician in certifying him for a contest that results in death to the prizefighter.

On September 3, 1951, the plaintiff's intestate, George Flores, a professional fighter, died from brain injuries which he received in a prize fight held in Madison Square Garden on August 29, 1951. His administrator filed a claim for wrongful death against the State of New York, alleging that the state, acting through its duly authorized agency, the state athletic commission and its medical advisory board, was negligent in issuing its license for the fight in question. Flores had participated in boxing matches on July 24, 1951 and on August 14, 1951 and had suffered a technical knockout in each of them. Plaintiff alleged that as a result of the prior beatings Flores' condition made it unsafe for him to engage in the fight in question, that this was known to the examining physician and that to license Flores to fight under such circumstances subjected him to a serious and unwarranted risk. The court of claims considered whether Flores' brain injury should have been discovered or reasonably anticipated by the doctors examining him and, if so, whether their negligence was attributable to the State of New York. Both these questions were answered by the court of claims in the affirmative and a recovery was allowed. *Rosensweig v. State,* 208 Misc. 1065, 146 N.Y.S.2d 589 (Ct. Cl. 1955).

The court of claims determined that good medical practice requires that a person who has received a severe beating about the head be kept inactive for a period of from six weeks to two months, and that in no event should a person who has been rendered unconscious be subjected to further trauma within a two-month period. In view of the fact that the examining physician at Flores' last fight concurred in the soundness of these propositions, the inquiry was why Flores was not prevented from entering the ring for the final bout. The answer given was that the matter of suspension was up to the attending physician at Flores' *preceding* fight. The reaction of the court of claims to this answer was indicated as follows: "This kind of reasoning calls for a doctor, who at the time is the sole master of the patient's fate, to discard his own medical knowledge and experience, to push aside his own observations and to submerge his own conscience, to defer to the judgment of someone else. This type of reasoning opens the door to such tragic and foreseeable consequences that we hold it to be negligence." 208 Misc. 1065, 1073, 146 N.Y.S.2d 589, 597.

In considering the liability of the state for the negligence of the examining physician, the court of claims found that a master-servant relation existed by virtue of the control exercised by the state athletic commission over boxing in this state pursuant to statute. The commission, in addition to licensing almost everyone connected with the bouts, also designates the particular doctors who may perform the examinations and designates the fee to be paid the doctors by the promoters.

The appellate division reversed the holding of the court of claims on the ground that, even conceding that an employer-employee relationship existed, negligence was not proven. 5 App. Div. 2d 293, 171 N.Y.S. 2d 912 (1958). The court relied on the holding in *St. George v. State,* 283 App. Div. 245, *aff'd,* 308 N.Y. 681, 127 N.Y.S.2d 147, 124 N.E.2d 320 (1954), in which the state was found to be not liable for an honest error of judgment by a doctor employed by it.

That case involved the discharge of a person as cured from a state mental hospital, who killed a number of persons shortly after his discharge. Indications were that a wrong diagnosis had been made of his condition at the hospital. Yet, it seems that the *St. George* case and the principal case can be distinguished in that the former contained no evidence of a departure from sound medical practice, while the latter contains an admission by at least one of the doctors that sound medical practice was not followed.

The appellate division pointed out that there was no official rule requiring the recommended lay-off and that the state was under no duty to adopt or enforce such a rule if a careful medical examination indicated, as here, that the fighter was in good physical condition. However, it is not clear why the doctors were not deemed under a duty to see that all sound medical practices were observed that might protect their patients from aggravating any possible injuries not readily discernible in a medical examination. Such a duty has been held to exist in the somewhat similar case in which a physician retained by a private employer to examine employees fails to advise an employee of tuberculosis discovered during the examination. *Union Carbide & Carbon Corp. v. Stapleton,* 237 F.2d 229 (6th Cir. 1956).

The court of appeals, in affirming the result reached by the appellate division, took the position that even if there had been negligence on the part of the examining physicians, there was no master-servant relationship on which to predicate the liability of the state. 5 N.Y.2d 404, 158 N.E.2d 229, 185 N.Y.S.2d 521 (1959). The rationale of the majority opinion is that the legislature intended only to prescribe regulatory measures to promote a public policy of reducing the risk of permanent injury to fighters and that there was no legislative intent to consider persons entrusted with enforcing these rules as employees of the state. Otherwise, by a parity of reasoning, other officials who are licensed and have their compensation fixed by a commission would become servants of the state. The majority felt, justifiably it would seem, that such an enlargement of public employment should be made consciously if it is intended. To find that the doctors were acting as employees of the state would in effect thrust an agency upon the state against its will and would impose upon it a great financial responsibility.

In contrast to the approach taken by the majority opinion, of interpreting the legislative intent in passing the statutes regulating the boxing business, the dissenting opinion approaches the problem by applying traditional and settled principles of agency law. The tenor of the dissent is to the effect that since the state has retained such close and exclusive direction and control over the physical examinations of the boxers and the physicians who made the examinations, it has assumed the liability for negligent performance of the duties imposed, and that its responsibility should be made incident to its control. The dissent also indicates a belief that the court of claims was justified in finding that there was a conscious departure from sound medical practice thus indicating negligence on the part of the examining physician.

Nearly everyone connected with professional boxing in New York is required to adhere to rigid rules imposed by the state. Yet, the state, while exercising such direction and control as would ordinarily suffice to establish a master-servant relationship, is held not to assume the liability usually imposed upon a master for the negligence of his servants.

J.A.C.

NEGLIGENCE — MAINTENANCE OF PREMISES — CONSTRUCTION CODE

Does the State Building Construction Code impose an absolute duty upon the owner of a building subject to the Code to install a handrail and artificial illumination on the stairway of his building, for the breach of which a social guest of one of his tenants may recover damages for injuries resulting from a fall on the staircase even though the negligence of the guest may have contributed to the accident? This singular question of law is determined in *Major v. Waverly & Ogden, Inc.*, 8 App.Div.2d 380, 190 N.Y.S.2d 526 (1959).

The appellant, who was visiting a tenant in the respondent's building, brought an action to recover damages for personal injuries sustained when she fell down a flight of stairs in the building. The appellant contended that a violation of the State Building Construction Code (hereinafter called the Construction Code), formulated by the State Building Code Commission pursuant to EXECUTIVE LAW §§ 370–87, creates a liability per se in favor of the injured party. The trial court charged that the gravamen of the action was in negligence and instructed the jury that a recovery by plaintiff in such an action must rest on proof of the defendant's negligence which was the proximate cause of the plaintiff's injuries and on proof by the plaintiff of her freedom from contributory negligence. The jury returned a verdict for the respondent. The appellate division, second department, unanimously affirmed the judgment entered on the verdict.

The provisions of the Construction Code allegedly violated by respondent require in effect that stairs of more than three risers be provided with a handrail and be sufficiently lighted to allow safe use. It was undisputed in the principal case that the village in which respondent's building was located had adopted the Construction Code and that its stated provisions applied to the building.

In New York the rule is well established that where a statute expressly or impliedly exhibits an intention to protect an individual or a special class of persons, a violation of the statute creates a liability per se in favor of the protected individual or class. *Amberg v. Kinley,* 214 N.Y. 531, 108 N.E. 830 (1915); *Martin v. Herzog*, 228 N.Y. 164, 126 N.E. 814 (1920); *Di Caprio v. New York Cent. R.R.,* 231 N.Y. 94, 131 N.E. 746 (1921). After carefully examining the applicable provisions of the Executive Law and the Construction Code, the court concluded that the rule did not apply. "It seems obvious that the Construction Code was not formulated for the special benefit of a particular class, but rather was designed to provide reasonably uniform standards for construction and construction materials and reasonable safeguards generally for the safety, health and welfare of the occupants of buildings (cf. Executive Law, §375; State Building Construction Code, §A-102). No legislative intent is apparent to create a statutory cause of action in favor of any member of the public who may be injured by a violation of the Construction Code." 8 App. Div.2d 380, 383–84, 190 N.Y.S.2d 526, 529–30.

The court further reasoned that even assuming the Construction Code was designed to protect the occupants of buildings subject to the Code, it would not follow that appellant could recover for her injuries. This argument was based on the principle that the violation of a statute intended to benefit the public at large or a limited class of persons of which the plaintiff is not a member does not constitute negligence per se or, as it is sometimes called, conclusive evidence of negligence. *Schmidt v. Merchants Despatch Co.,* 270 N.Y. 287, 200 N.E. 824 (1936); *Amberg v. Kinley, supra.*

The opinion leaves untouched what appears to be a decisive argument in the respondent's favor. In New York a clear distinction has been drawn between the effect of the violation of a statute enacted by the legislature and the violation of a rule or rules of an administrative body such as those of the State Building Code Commission in the principal case. While it has been established that the violation of a statute enacted for the benefit of a particular individual or special class of persons results in liability per se in favor of the protected individual or class, the violation of a rule of an administrative body does not result in such liability. The leading New York case espousing the latter rule is *Shumer v. Caplin,* 241 N.Y. 346, 150 N.E. 139 (1925).

In the *Shumer* case plaintiff, a window cleaner, suffered injuries when he fell from the fifth floor of a building owned by the defendant. The plaintiff's theory for recovery was predicated upon the failure of the defendant to equip the windows with devices to which a window cleaner's belt might be fastened. The trial court instructed the jury that the defendant's violation of a rule promulgated by the Industrial Commission concerning safety appliances constituted negligence as a matter of law. The court of appeals in reversing the judgment of the appellate division stated:

> "The violation of a statute under certain circumstances may of itself establish negligence. Not so, however, with a rule or ordinance. A legislative declaration that a rule has the force and effect of law does not make it so, if by that it is meant it is the equivalent of or equal to a legislative enactment.
>
> The violation of the rule of the Commission . . . did not constitute negligence as a matter of law. A correct charge in this respect would have been that the violation of this rule did not establish negligence *per se,* but was simply some evidence of negligence which the jury could take into consideration with all the other evidence bearing on that subject." 241 N.Y. 346, 351, 150 N.E. 139, 140.

A similar result was reached in *Teller v. Prospect Heights Hospital,* 280 N.Y. 456, 21 N.E.2d 504 (1939), where the court held that a complaint which alleges the violation of a rule or regulation by the defendant does not state a cause of action in the absence of an allegation of negligence since the violation of an administrative rule or regulation constitutes merely some evidence of negligence.

Recently, the appellate division, fourth department, applied the rule in the case of *Vallina v. Wright & Kremers, Inc.,* 7 App. Div.2d 101, 180 N.Y.S.2d 707 (1958). The plaintiff sought to recover damages based on the defendant's negligence in failing to guard an excavation as required by a rule adopted by the Board of Standards and Appeals dealing with safety railings for openings or places into which a person might fall. The trial judge refused to submit the provisions of the rule to the jury. In reversing the judgment for the defendant and ordering a new trial, the appellate division held that while the violation of a rule adopted by the Board of Standards and Appeals would not give rise to absolute liability, it would constitute evidence which the jury could consider on the question of the defendant's negligence.

Thus, applying the rule clearly laid down by the court in the *Caplin* case, it is possible to proceed one step further than did the court in the principal case. Assuming that the Construction Code has as its purpose the protection of licensees and invitees, as well as the occupants of buildings subject to the Code, it can be stated that under present New York law a violation of the Construction Code by the owner of a building will not result in liability per se but merely will be evidence to be considered by a jury should an accident occur.

J.L.B.

WORKMEN'S COMPENSATION—APPLICATION OF LENT-EMPLOYEE DOCTRINE

The problem of the lent-employee is dealt with in the recent decision of *Bird v. New York Thruway Authority,* 8 App. Div. 2d 495, 188 N.Y.S. 2d 788 (1959). Pursuant to a letter from defendant to claimant's employer, claimant was sent to assist the defendant in determining suitable sites for secondary wells for restaurants along the Thruway. He was chauffered by an employee of the defendant who negligently ran into a deer, the resulting accident causing serious injury to claimant. In the action instituted in the court of claims, it was held that claimant was a special employee of defendant Thruway Authority, and that his exclusive remedy was workmen's compensation. *Bird v. New York Thruway Authority,* 13 Misc.2d 203, 177 N.Y.S.2d 926 (Ct.Cl. 1958). Only two alternatives were considered in the court of claims: either he was a special employee or he was an independent contractor. Since claimant had a general employer, it was decided that he was a special employee. However, the appellate division, reversing, held that a third alternative existed in that he could also be an employee of an independent contractor and thus not necessarily a special employee of the defendant.

In this case, there was sufficient evidence to sustain an action for damages arising from negligence. There was no argument concerning the existence of the Thruway Authority as a corporation distinct from the state, unlike the Department of Public Works. *Malone v. State,* 285 App.Div. 1218, *aff'd*, 1 N.Y. 2d 837, 135 N.E.2d 724 (1956). *Pantess v. Saratoga Springs Authority*, 255 App.Div. 426, 8 N.Y.S. 2d 103 (1938). The case, then, is decided upon the resolution of the issue of whether, in the application of the doctrine of respondeat superior, the defendant was a special employer of claimant.

There are two different situations in which the lent-employee doctrine is applicable. In the first instance, the borrowed servant commits a tort against a third person, and the question of vicarious liability is in issue. In the second situation, the borrowed servant is injured, as in the present case, and the applicability of workmen's compensation is in question. In 1 LARSON, WORKMEN'S COMPENSATION LAW §48:10 (1952), it is asserted that a distinction must be made between the vicarious liability situations and those involving workmen's compensation because there can be no compensation liability in the absence of an express or implied contract for hire between the employee and the borrowing employer. This is necessarily so because the employee gives up the right to sue at common law for the employer's negligence. Yet in situations of vicarious liability, the issue involved is the determination of the liability as between two employers.

This reasoning is in line with two New York decisions. *Charles v. Barrett*, 233 N.Y. 127, 135 N.E. 199 (1922); *Murray v. Union Ry. of N. Y. City*, 229 N.Y. 110, 127 N.E. 907 (1920). In the *Barrett* case, the lent-employee committed a tort against a third person who sued both employers, and the rule was enunciated that as long as the employee is furthering the business of his general employer by the service rendered to another, no inference of a new relation will be drawn unless control has been surrendered. The surrender of control will not be inferred from the mere fact of its division. The control test has been applied by the courts of other jurisdictions. See generally, 14 WASH. & LEE L. REV. 40 (1957). There was no mention of the test of consent in the decision in the *Barrett* case. However, in the *Murray* case, where the lent-employee was injured by the negligence of the borrowing employer, it was held that the borrowed servant could sue the borrowing employer in an action for negligence since the employee had no idea that he was working for anyone except his general employer. In reaching this decision, the court said: "The new relation cannot be thrust upon the servant without knowledge or consent. . . . He must understand that he is submitting himself to the control of a new master. We are not concerned at the moment with cases in which the rights of third persons are involved. We speak of cases where the parties to the disputed relation are the parties to the controversy. . . . Common-law rights and remedies are not lost by stumbling unawares into a new contractual relation.'' *Murray v. Union Ry. of N.Y. City, supra* at 113, 127 N.E. at 907. (Citations omitted.) Thus the courts have developed the rule that the consent of the employee is necessary to make the borrowing employer a special employer in compensation cases, *Schweitzer v. Thompson & Norris Co. of New Jersey,* 229 N.Y. 97, 127 N.E. 904 (1920), while it is not a test to be considered in establishing whether the borrowing employer is a special employer in vicarious liability cases. *Braxton v. Mendelson,* 233 N.Y. 122, 135 N.E. 198 (1922); *Irwin v. Klein,* 271 N.Y. 477, 3 N.E.2d 601 (1936); *Bartolomeo v. Charles Bennett Contracting Co.,* 245 N.Y. 66, 156 N.E. 98 (1927); *Ramsey v. New York Cent. R.R.,* 269 N.Y. 219, 199 N.E. 65 (1935). In the principal case, the court considered the tests of control, employee's consent, and for whom the work was being performed, and it was found that the defendant was not a special employer of claimant.

The difficulty in applying the tests of the lent-employee doctrine to different factual situations was noted by Judge Cardozo: ''The law that defines or seeks to define the distinction between general and special employers is beset with distinctions so delicate that chaos is the consequence. No lawyer can say with assurance in any given situation when one employment ends and the other begins.'' Cardozo, *The Ministry of Justice,* 35 HARV. L. REV. 113, 121 (1921). The difficulty of reconciling the cases was recognized by the Wisconsin Supreme Court in *Rhinelander Paper Co. v. Industrial Commission,* 206 Wis. 215, 239 N.W. 412 (1931). In the recent decision, *Aluminum Co. of America v. Ward,* 231 F. 2d 376 (6th Cir. 1956), commented on in 14 WASH. & LEE L. REV. 40 (1957), the above mentioned tests were applied to a similar factual situation but an opposite conclusion was reached. It was indicated that a large amount of the confusion has resulted from the tendency of the majority of American courts to fix liability on either the general employer or the special employer under circumstances where it would be more equitable to make both employers liable. This the Pennsylvania courts have done. See, *e.g.*, *Gordon v. S. M. Byers Motor Car Co.*, 309 Pa. 453, 164 A. 334 (1932).

This approach seems to provide the solution to the problem in compensation cases. In 1 LARSON, WORKMEN'S COMPENSATION LAW § 48:00 (1952), the general rule is stated as follows: "When a general employer lends an employee to a special employer, the special employer becomes liable for workmen's compensation only if (a) The employee has made a contract of hire, express or implied with the special employer; (b) The work being done is essentially that of the special employer; and (c) The special employer has the right to control the details of the work. When all three of the above conditions are satisfied in relation to both employers, both employers are liable for workmen's compensation." The New York decisions seem to be in accord with the quoted passage, in holding that the existence of both a general and a special employer is not inconsistent with the employer-employee relation with both employers. *De Noyer v. Cavanaugh*, 221 N.Y. 273, 116 N.E. 992 (1917); *Dennison v. Peckham Rd. Corp.*, 295 N.Y. 457, 68 N.E. 2d 440 (1946); *Cook v. Buffalo Gen. Hosp.*, 308 N.Y. 480, 127 N.E.2d 66 (1955).

It is understandable that many situations will arise where it will be almost impossible to say that in a given instance the employee is working for one employer and not the other. In such cases, determination of the question of which employer is to be held liable would seem to become arbitrary. Thus it appears that the only solution in cases involving the lent-employee doctrine which will give rise to greater uniformity and justice is to fix liabilty on both the general and special employers.

P.J.D.

Digest of Current New York Decisions

COMMUNIST INVESTIGATIONS

Three teachers, a school clerk and a principal in the New York City school system were suspended for refusal to identify other school personnel as past or present members of the Communist Party. An associate professor at Hunter College was also suspended for the same reason. The State Commissioner of Education determined on an appeal taken by the teachers that their refusal to answer questions concerning past or present affiliations of other teachers furnished no basis for disciplinary action. He enjoined the City Superintendent of Schools from directing these employees to make such identification and annulled the dismissal of the associate professor. Appellants contended that such action by the commissioner ". . . prevents enforcement of the Feinberg Law (Education Law § 3022), and represents an illegal attempt, in the guise of an administrative determination, to repeal that statute." *Held:* The N. Y. Education Law, section 310, places all matters pertaining to the general school system of the state within the control of the Department of Education. Decisions by the commissioner, unless arbitrary, are final and not subject to judicial review. The decision made here is not deemed arbitrary since it must be held that the desirable objective of ridding the schools of communists would not be served by such a method of inquiry. If the enforcement of our law must depend solely upon informers, conditions would become chaotic. Several other methods are available to accomplish the ferreting out of communists. The Commissioner of Education as chief administrative officer of the educational system may require the use of these other methods if he believes they are less injurious to the educational system. *Board of Education v. Allen,* 6 N.Y. 2d 127, 160 N.E.2d 119, 188 N.Y.S.2d 515 (May, 1959).

CORROBORATION

Defendant was convicted of impairing the morals of his ten year old daughter by two separate acts. N.Y. PENAL LAW § 483. The police were at the scene of the alleged second assault within four hours of the stated time of occurrence. No evidence was offered of any examination of the child. There was no circumstantial evidence to support the child's sworn testimony. *Held:* Conviction reversed on the ground that defendant had not been proved guilty beyond a reasonable doubt. In this and certain other sexual offenses specific corroboration of the complainant's testimony is not required. However, the absence of such legislation does not mean that the courts should not scrutinize such testimony with special care. Where the witness has been sworn, supporting evidence of every material fact may not be necessary. The courts may not arbitrarily require full corroboration in instances where the trial court has taken the unsworn statement of the witness, while at the same time dispensing with all objective verification merely because an oath was administered. *People v. Oyola,* 6 N.Y. 2d 259, 156 N.E. 2d 917, 189 N.Y.S.2d 203 (July, 1959).

CRIMINAL LAW

The defendant was convicted and fined for violating section 2143 of the Penal Law, which prohibited labor on Sundays, excepting the works of necessity and charity, defined by the statute as ". . . whatever is needful during the day for the good order, health, or comfort of the community." The defendant's offense consisted in washing his clothes in a coin-operated laundromat on the prohibited day. *Held:* The demands of modern labor, coupled with the inadequacy of tenements to store such facilities, brought the defendant's act under the exception of "necessity" as defined by the statute, and added to the defendant's "comfort" and repose. The laundromat actually reduced labor, and even Scripture commends cleanliness. The statute applies only to serious interruptions of the public peace. *People v. Aliprantis,* 8 App. Div. 2d 276, 187 N.Y.S.2d 477 (1st Dep't, June, 1959).

DECEDENT'S ESTATE

The deceased, a non-resident, took out an automobile liability policy with an insurer licensed to do business in New York. The contract was entered into in Nassau County, New York. An injured party brought a negligence suit against the policy holder arising out of a car accident occurring in another state and personally served the decedent in New York. After decedent died in a foreign state and his will had been probated there, the injured party's attorneys petitioned for ancillary letters of administration with the will annexed. The decedent's executrix moved to dismiss for want of jurisdiction, on the grounds of non-residence of the deceased and non-existence of any attachable property of the deceased in the county where the proceeding was brought. *Held:* The required property may be any asset or debt warranting the surrogate in taking jurisdiction and appointing a fiduciary, and that the insurance policy of deceased contains valuable rights of exoneration and indemnity which bring the policy within the statute as "property." Furthermore, section 52 of the Vehicle and Traffic Law, though not directly applicable to the case, manifests a legislative intent that such actions as the one commenced by the injured party in this case should not be abated by death. *In re Riggle's Will,* — Misc. 2d —, 188 N.Y.S.2d 622 (Surr. Ct., Nassau County, July, 1959).

EVIDENCE

The plaintiff entered into an oral agreement with the defendant whereby in exchange for a deed to her property, the defendant promised to pay plaintiff's debts and to permit life occupancy in two rooms of the house conveyed. Plaintiff's action to reform the deed to add that it was subject to the life tenancy was consolidated with the defendant's proceeding to remove plaintiff. After trial, the reformation action was dismissed and the plaintiff was ordered evicted. The appellate division affirmed. The defendant's version of the agreement was that the plaintiff was to be permitted tenancy only "as long as the Department of Housing and Building would not bother him because of her living there." The Department of Housing did in fact object on the ground that the occupancy made the house an unlawful multiple dwelling. Plaintiff attempted to introduce Department of Welfare memoranda to prove statements by the defendant that the agreement provided for rent free life occupancy. These memoranda were held inadmissible at the trial and by the appellate division. *Held:* The exclusion of the records was prejudicial error, their admissions as records taken in the regular course of business being provided for by section 374-a of the Civil Practice Act. *Kelly v. Wasserman,* 5 N.Y. 2d 425, 158 N.E. 2d 241, 185 N.Y.S. 2d 538, (April, 1959).

INJUNCTION

Appeal from an order granting a temporary injunction barring defendants from using the word "Republicans," the initials "G.O.P." and the traditional emblems of the Republican party (the eagle and the elephant) in the names of their organizations. Defendants were actual, but dissident, members of the Republican party, and were engaged in a rivalry, for control of the county committee with plaintiffs who were the established leaders. *Held:* The temporary injunction granted was too broad and should be modified to prevent confusion in the minds of the voters while not discouraging legitimate political activities. Courts of equity may restrain the use of names, marks, or other devices if their use is designed or will tend to deceive persons as to their origin or character. To accomplish both objectives the injunction was modified to allow the defendants to continue to use the name and emblems, providing the words, "Opposed to the Regular Republican District and

County Organizations,'' were prominently included with any such use. *Mele v. Ryder,* 8 App. Div. 2d 390, 188 N.Y.S. 2d 446, (1st Dep't., June, 1959).

INSURANCE

Plaintiff alleged that a combination automobile insurance policy issued by defendant, afforded to it insurance protection against liability for the death of one of its police officers as a result of the collision of a police car. The decedent, a policeman, suffered injuries resulting in death while riding as a passenger in the car. Defendant maintained that the policy did not cover the death of deceased since he was an employee of the city and was, therefore, within a clause of the policy which excludes city employees from coverage. *Held:* The deceased was not an employee of the insured and did not, therefore, come within the exclusionary clause. Firemen and policemen are not classed as city employees but as a public officer performing a governmental function. They are considered employees when appointed to operate a municipally owned vehicle and then only for the purpose of imposing liability against the municipality for the operation of the vehicle which would not exist otherwise. *City of Albany v. Standard Accident Insurance Co.,* 8 App. Div. 2d 247, 187 N.Y.S.2d 242, (3d Dep't., June, 1959).

INSURANCE

Plaintiff, administratrix, recovered a judgment for $12,500 from the insured, and the interest in this wrongful death action, as computed from the date of the intestate's death, brought the sum to a total amount of $19,532. The insured's policy with defendant-insurer provided that the insured would bear the primary loss up to $10,000 and that thereafter defendant would pay all damages, taxed court costs, and interest thereon from any judgment suffered by the insured. Defendant claims it is only liable for the interest on $2,500, and not on $12,500 as plaintiff contends. *Held:* The interest is a statutory addition to the verdict, and forms part of the damages for which defendant is liable, the insured's obligation ending at $10,000. The "interest" in wrongful death actions is synonymous with damages, unlike the interest computed from date of judgment. The dissenting judge felt that it was still "interest." *Welsh v. Peerless Casualty Co.,* 8 App. Div. 2d 373, 187 N.Y.S. 2d 842 (1st Dep't., June, 1959).

LIBEL

An article was published in defendant's paper in which plaintiff was mentioned in connection with the forfeiture of bail of a third party who had been charged with sexual offenses. The words of the article in themselves were not defamatory, but plaintiff claims that the article by innuendo, identified him as the one who aided in the escape, of the third party, as a result of which he has been injured in his profession as a criminologist. *Held:* The complaint does not state a cause of action. The purpose of the innuendo is to explain matter that is insufficiently expressed, and to point out the libelous meaning of the words themselves. An article which is not susceptible of a libelous meaning cannot be made so by the innuendo. If the alleged innuendo is not supported in fact or in law the article may not be regarded as defamatory. *Tracy v. Newsday, Inc.,* 5 N.Y.2d 134, 155 N.E.2d 853, 182 N.Y.S.2d 1 (January, 1959).

MENTAL DISTURBANCE

Defendant bus company's servant, ignoring two signals by plaintiff passenger to let her off at her regular stop, carried her into another county. The servant had shouted that it had been too late to stop. When plaintiff asked for a return fare, the driver asked her insulting questions and gave her a transfer which the opposite-bound bus would not accept. Plaintiff was forced to pay a second fare. In this action for breach of contract and for mental suffering, defendant claims its liability is limited to the amount of the fares, and that plaintiff cannot recover for mental anguish. *Held:* Defendant is liable for the natural consequences of his servant's acts, and it owed plaintiff a duty of safe and courteous passage, the breach of which rendered it liable for the contractual amount plus all consequential damages in the form of mental suffering, humiliation, and discomfort suffered by plaintiff thereby. *Brown v. Fifth Avenue Coach Lines Inc.,* 16 Misc. 2d 692, 185 N.Y.S.2d 923 (New York City Munic. Ct., Manhattan Borough, May, 1959).

NEGLIGENCE

A railroad train operated by defendant's servants collided with plaintiff's cows, killing three and driving the rest into such a state of fright that they severely injured themselves by colliding with one another and stationary objects on the ground. The injuries necessitated their sale at a great loss to plaintiff. The Railroad Law required defendant to erect and maintain fences along its line, and made it liable for any damage done to cattle if it failed to comply. The evidence showed that the cattle had entered the track by way of holes in the defendant's fence, that these defects had been called to the defendant's attention beforehand, and and that it had done nothing about the holes. The defendant disclaimed liability for injuries other than those caused by collision with the train. *Held:* The statute's intent is to protect cattle from trains, and it implies that the defendant shall be liable for all injuries to cattle, whether by physical collision or by the external or internal operation of fright, proximately caused by the defendant's failure to maintain an adequate fence. Injuries due to fright are now compensable in this state, and, in the case of animals, there is no danger of fabrication of such injuries. *Gonsen-*

hauser v. New York Central R.R., 8 App. Div. 2d 483, — N.Y.S.2d—(4th Dep't., July, 1959).

PHYSICAL EXAMINATION OF PROSECUTRIX

Defendant was convicted of impairing the morals of his minor step daughter, N.Y. PENAL LAW § 483. The evidence against the defendant consisted entirely of the child's testimony and was to the effect that she had regular and frequent intercourse with the defendant. The child was given a physical examination but the doctor's findings were not disclosed. On the trial, defendant's counsel called on the prosecution to stipulate that the child had been examined and found to be a virgin. The Assistant District Attorney refused on the grounds that this was immaterial. *Held:* The conviction should be reversed. Common fairness requires that a defendant in a criminal action be allowed to have a physical examination of the complainant to learn whether or not a complaining witness is in such a condition as would be expected were her testimony true. *People v. Porcaro,* 6 N.Y.2d 248, 160 N.E.2d 488, 174 N.Y.S.2d 447 (July, 1959).

SLANDER

While speaking at a dinner attended by one-hundred fifty persons, the defendant, Commissioner of the New York State Conservation Department, stated that plaintiff had been guilty of "... deliberate sabotage or gross neglect ..." while carrying out an experiment for the department. Plaintiff was a civil servant of the department. *Held:* The court allowed defendant's first defense of fair comment to stand but only to introduce mitigating circumstances. The purpose of fair comment is to allow a fair and honest statement of actual facts regarding public acts and reasonable comment thereof. Attacks on private character even in the belief the statements are true are not permitted. The defense of absolute privilege also raised by the defendant was not allowed to stand. The reasons for allowing an executive officer of the state an absolute privilege in making his official reports do not extend to comments made in after dinner speeches. To allow such an extension would cause harm to individual citizens with no corresponding improvement of service to the government. *Cheatum v. Wehle,* 5 N.Y.2d 585, 159 N.E.2d 166, 172 N.Y.S.2d 62 (April, 1959).

WRONGFUL DEATH

The plaintiff's intestate was a diamond dealer whose business involved taking diamonds on consigment under express agreements that the diamonds would be redelivered on demand. The intestate gave one of these consignments to the defendants (who were also dealers) for the purpose of selling them. Thereafter, the defendants refused to buy or to return the diamonds to the intestate, and told him that they would disclaim their possession if inquiry were made. The intestate worried about his reputation and business as a consequence, and, in this action brought by his administratrix, it was alleged that intestate became so apprehensive and nervous due to the malicious acts of the defendants, that he finally took his life due to an uncontrollable impulse. Plaintiff seeks recovery on the theories of prima facie tort, conversion, and wrongful death, to which theories the defendants prosecuted demurring motions. *Held:* The availability of the traditional conversion cause of action requires the sustaining of the motion to the first theory, which is usable only if no other remedy exists; that damages for mental suffering are awarded for malicious conversions, and the second motion is thus denied; and that if the wrongful act of the defendants can be shown to have proximately caused the suicide by means of an uncontrollable impulse proven to be such, then the third theory is allowable, and the motion will be denied. *Cauverien v. De Metz,* — Misc. 2d —, 188 N.Y.S. 2d 627 (Sup. Ct., May, 1959).

Legislation

CODE OF CRIMINAL PROCEDURE

Sections 482 and 717—Amended—Proof of Previous Convictions.

Certain sections of the Penal Law allow or require increased punishment for a defendant who has been previously convicted. See, Penal Law §§ 1941–42 with respect to subsequent felony convictions.

Before 1926 the fact of previous conviction, in a case where such previous conviction would alter the punishment prescribed, had to be alleged in the indictment or information and proved as an element of the prosecution's case. *People v. Rosen,* 208 N.Y. 169, 101 N.E. 851 (1913). In order to punish multiple offenders when the defendant's previous convictions were unknown at the time of the indictment, Penal Law § 1943 was added in 1926. Section 1943 provides that a prisoner can be resentenced as a multiple offender after sentence or conviction, upon the filing of an information charging previous conviction. The prisoner must then be produced before the court, his plea taken and a jury empanelled to determine whether the prisoner is the same person as mentioned in the information. Upon confession or jury verdict establishing such fact the prisoner may then be sentenced as a multiple offender under Penal Law §§ 1940–1942. See, *People v. Gowasky,* 244 N.Y. 451, 155 N.E. 737 (1927); *People v. Spagnolia,* 241 App. Div. 775, 270 N.Y. Supp. 95 (3rd Dept. 1934) (dissenting).

In 1957 the Legislature enacted section 275-b of the Code of Criminal Procedure providing that the indictment may not allege a prior conviction unless it affects the degree of the crime charged or is an element of such crime.

The amendments to sections 482 and 717 of the Code of Criminal Procedure do not effect Penal Law §§ 1943 and 1751-a (narcotics violations). Their purpose is merely to create a procedure whereby the defendant's previous convictions may be alleged and proved in a case when such previous conviction requires or authorizes punishment different from that prescribed if defendant were a first offender. These amendments only apply where previous conviction may not be alleged in the indictment (section 482) or information (section 717) because of the exceptions in sections 275-b and 145 of the Code of Criminal Procedure where previous conviction affects the degree of the crime.

If the above conditions are satisfied, and only after a plea of guilty is entered or a verdict of guilty is recorded, then an information shall be filed accusing the defendant of such previous conviction or convictions. The defendant must then be brought before the court and proceedings brought upon the information in the same manner as for the prosecution of the crime for which defendant is to be sentenced. The defendant has the same rights as he would have in a proceeding on an indictment charging the crime for which he is to be sentenced. If the defendant does not plead to the information a plea of not guilty must be entered.

The amendment to the Code of Criminal Procedure § 717 is not applicable where the conviction upon which defendant is to be sentenced is not a conviction of a crime.

J.E.B.

CODE OF CRIMINAL PROCEDURE

Section 335-b—New, Section 699(3)—Amended—Defendant to be warned of effect of previous convictions.

§ 335-b provides as follows:

"Except in a case governed by section three hundred thirty-five-a of this code, where the crime or offense with which defendant is charged or to which he pleads guilty is one for which a different or additional punishment is prescribed or expressly authorized by reason of the fact that the defendant has previously been convicted of a crime or offense, the court upon the arraignment of the defendant and before accepting a plea must inform the defendant that if he has previously been so convicted that fact may be established after his conviction or plea of guilty in the action before the court and he will be subject to such different or additional punishment."

The amendment to section 699 provides the same with respect to a court of special sessions or police court.

The exception under section 335-a provides that a person charged with certain traffic violations be informed that if he pleads guilty or is convicted his operator's license may be revoked or suspended.

The purpose of sections 335-b and 699 is to inform a person charged with a crime of the full meaning and consequences of the charge against him and to what punishment he is liable if he admits the alleged offense, and if not, so he may adequately prepare his defense.

These sections do not require that defendant be warned that he will be charged or sentenced as a previous offender, but merely provide that he shall be informed that he may be charged as a previous offender, when and if the fact of such previous conviction is brought to the court's attention.

The section only applies where the crime or offense with which defendant is charged is one which authorizes different or additional punishment in the event of such previous conviction.

J.E.B.

Section 202-b—New—Pledgee's right to buy at public sale of pledged property.

This new section of the Lien Law provides as follows: "§ 202-b. Pledgee may buy at public sale. Unless the pledge agreement otherwise provides, in all cases where a pledgee may lawfully sell pledged property and the property is sold at public sale, the pledgee, or his assignee or the legal representative of either, may fairly and in good faith purchase the pledged property or any part thereof at the sale. This section does not apply to a sale of property pawned or pledged with a pawnbroker."[1]

This legislation was recommended by the Law Revision Commission because prior to the enactment of the section, courts in New York followed the settled common law rule that a pledgee may not purchase at the sale of the pledged article except with the pledgor's consent, or unless the pledge is held and the sale conducted by a third party. *Roach v. Duckworth,* 95 N.Y. 391 (1884); *Perkins v. Meyer,* 302 N.Y. 139, 96 N.E.2d 744 (1951).

The inconsistency of adhering to the common law rule in this one instance is apparent since the secured party can purchase at public sale of the security in the case of a mortgage, chattel mortgage, conditional sale, trust receipt or unpaid seller's lien. In California and Minnesota the distinction has already been eliminated.

It will be noted that the pledgee must act "fairly and in good faith" and the sale must be conducted in good faith. This provision protects the pledgor against the abuses which the common law rule sought to eliminate without the unnecessary restrictiveness of that rule.

J.E.B.

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[1] The last sentence being covered under N.Y. GEN. BUS. LAW § 49.

DOMESTIC RELATIONS LAW

Section 56-a—New—Marital Relation not to affect construction of instruments and transactions involving personal property.

The Domestic Relations Law is amended by Chapter 580 of the Laws of 1959 which adds a new section, 56-a, abrogating the rebuttable presumption that a transfer of personal property into the names of husband and wife confers upon the wife a right of survivorship only, where the property or the consideration for the transaction came from the husband. *Belfanc v. Belfanc,* 252 App. Div. 453, 300 N.Y.S. 319 (3rd Dep't 1938), *aff'd,* 278 N.Y. 563, 16 N.E. 2d 103 (1938); *West v. McCullough,* 123 App. Div. 846, 108 N.Y.S. 493 (2d Dep't 1908), *aff'd,* 194 N.Y. 518, 87 N.E. 1130 (1909). This section also abrogates the presumption under which a bank account in the names of persons who are husband and wife creates a right of survivorship in the wife, even though the form of the account is insufficient under the Banking Law to create a joint tenancy, if the money deposited belonged to the husband. *In re Kelly's Estate,* 259 App. Div. 1024, 20 N.Y.S. 2d 689 (2d Dep't 1940), *modified on other grounds,* 285 N.Y. 139, 33 N.E. 2d 62 (1941). See also, N.Y. Sess. Laws 1959, ch. 580, Statutory Note.

The primary distinction between a joint tenancy and a tenancy in common is that in the former the joint tenant possesses a right of survivorship whereas, in the latter the tenant in common possesses no such right of survivorship. New York has abolished the common law rule that a grant or devise of realty to two or more persons, without other words, created a joint tenancy. The present rule is embodied in section 66 of the Real Property Law, providing, in part, as follows: ''Every estate granted or devised to two or more persons in their own right shall be a tenancy in common, unless expressly declared to be a joint tenancy; . . .'' Any ambiguity as to the nature of the tenancy intended to be created is resolved by the statute in favor of a tenancy in common rather than a joint tenancy. Originally, the rule adopted by this statute applied only to interests in real property but it is now applied to interests in personal property as well. *Overheiser v. Lackey,* 207 N.Y. 229, 100 N.E. 738 (1912).

Prior to the adoption of section 56-a of the Domestic Relations Law, the courts of New York created an exception to the general rule in construing the interests created in personal property when the parties to the transaction or to the instrument were husband and wife. This exception was the result of the common law rule that a husband owned all his wife's personalty. When a husband purported to pass to his wife an interest in his own personalty it was felt that he could not have intended to give her anything greater than a right of survivorship. In litigations involving bank accounts, bonds and mortgages, notes or other investments in personal property taken in the joint names of husband and wife, the courts applied a rebuttable presumption that the husband's intention was to make a gift contingent upon survivorship, when the husband alone provided the money or property. *Belfanc v. Belfanc, supra; West v. McCullough, supra.* Where a different intention on the part of a husband could not be shown, the presumption was also applied when a third party, at the husband's instance transferred property to the husband and wife. *Sanford v. Sanford,* 45 N.Y. 723 (1871).

In these transactions the courts presumed that the husband intended to benefit his wife with the ownership of the property upon his death, by way of a gift *causa mortis.* During his life the husband retained complete ownership, control and right of disposition and the wife had no interest therein enforcible against him. The transfer possesses all the essential qualities of a gift *causa mortis,* which he may revoke in his lifetime and which does not take effect until his death if not previously recalled. While he lives his control over it is unlimited and at his death it becomes her absolute property, if she survives him but if she does not the gift is not consummated, and the husband retains the entire title. *Matter of Albrecht,* 136 N.Y. 91, 95, 32 N.E. 632, 633, 18 L.R.A. 329, 331 (1892).

Under provisions of the Banking Law deposits in the name of the depositor and another person, made in the statutory form, become the property of such persons as joint tenants, and upon the death of one of the parties the statutory presumption creating a joint tenancy becomes conclusive. *Banking Law,* §§ 134(3), 239(3), 310(6). Where a deposit is not in statutory form, a presumption arises that the authorization for payment to either is for convenience only. *Matter of Bolin,* 136 N.Y. 177, 32 N.E. 626 (1892); *McDonald v. Sargent,* 121 Misc. 437, 201 N.Y. Supp. 129 (Sup. Ct. 1923).

When the parties to a joint bank account in statutory form are husband and wife, the statute controls and creates a joint tenancy in the monies deposited. Prior to the adoption of section 56-a of the Domestic Relations Law, however, where the deposit was not in statutory form and the monies deposited to the account were derived from the husband it was presumed, in the absence of evidence to the contrary, that the husband intended to give a right of survivorship to his wife even in the absence of statutory language indicating a joint tenancy. *In re Kelly's Estate, supra.*

The obvious inconsistency created by the use of this presumption when the parties are husband and wife is abolished by the new section 56-a of the Domestic Relations Law:

Section 56-a. Marital relation not to affect construction of instruments and transactions involving personal property.

1. Where an instrument or transaction creating or transferring an interest in personal property would create a joint tenancy or tenancy in common in persons not husband and wife, it shall create a joint tenancy or a tenancy in

common, as the case may be, in persons who are husband and wife.

2. An instrument or transaction which does not create a right of survivorship in personal property between persons who are not husband and wife shall not create a right of survivorship in personal property between persons who are husband and wife.

3. This section applies without regard to the identity of the person who makes the transfer or at whose instance it is had, or from whom the consideration for the instrument or transaction proceeds.

No good reason exists today for treating such interests in personalty differently merely because the parties to the transaction or instrument are husband and wife. The use of a presumption to create a right of survivorship in the wife was merely a device, adopted by the courts, to insure the wife title upon her husband's death in an era when a husband owned all his wife's personal property. Since common law restrictions upon married women have been abolished, it is normal to infer that when personalty is held in the name of husband and wife the husband intends to create a present interest in his wife regardless of who provides the consideration for the instrument or transaction. Section 56-a of the Domestic Relations Law destroys one of the last surviving common law restrictions placed on married women.

R.P.D.

Enforcement of Delinquent Property Taxes in New York

Part I

Edward S. Godfrey *

In 1939, legislation was enacted in New York authorizing municipalities by resolution to adopt a method of foreclosing certain property tax liens by action in rem.[1] In general approach, the New York statute follows the Model

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[1] N.Y. Sess. Laws 1939, ch. 692. The procedure of in rem tax foreclosure may be adopted by any "tax district," defined to include (1) a city or (2) a county, town, village or school district having power to enforce the collection of taxes on real property by tax sale. N. Y. REAL PROPERTY TAX LAW § 1102. The provisions of the 1939 statute have been carried forward, in substance, into N. Y. REAL PROPERTY TAX LAW art. 11 (superseding former N. Y. TAX LAW art. 7-A, which codified the 1939 statute). Under those provisions, a tax district may adopt alternative procedures for enforcement of tax liens either by foreclosure as in an action to foreclose a mortgage or, under certain conditions, by foreclosure in rem. A tax district may adopt either of these alternatives, or both. N. Y. REAL PROPERTY TAX LAW § 1104. Adoption of either type of foreclosure as a remedy by a tax district does not displace the administrative tax sale (*i.e.,* sale by the county treasurer) as an available method of enforcement in the district.

General provisions for enforcement of collection of delinquent taxes by administrative sale are now contained in N. Y. REAL PROPERTY TAX LAW art. 10 (superseding former N. Y. TAX LAW arts. 6 and 7).

Where a tax district elects by resolution to adopt the method of foreclosure in rem, it commences such an action by filing in the county clerk's office a list of taxes delinquent for at least four years. Such filing constitutes the filing of a complaint in foreclosure and notice of lis pendens against the specified property. Notice of such an action is given by publication, by posting in specified public places and by mailing to the owner's last known address. Failure to answer or pay the outstanding tax liens being foreclosed, with interest and penalties, results in foreclosure of any person's right, title, interest or equity of redemption in the delinquent property. Judgment of foreclosure awards possession to the tax district and directs execution of a deed conveying title in fee simple absolute to

Tax Collection Law proposed by a committee of the National Municipal League in 1935 [2] and reflects the dominant concern of that group to protect and enlarge the tax resources of municipalities.[3] Two recent cases,[4] culminating

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the tax district. The deed is made presumptive evidence of the regularity of the proceedings. After two years that presumption becomes conclusive.

[2] See National Municipal League, *Report of the Committee on a Model Tax Collection Law,* 24 NAT'L MUNIC. REV. 289 (1935). The model law is discussed in Brandis, *Tax Sales and Foreclosures under the Model Tax Collection Law,* 3 LAW & CONTEMP. PROB. 406 (1936).

[3] The committee's statement of conclusions about what a model collection law should contain is silent on the possibility of hardship cases arising out of circumstances over which the taxpayer may not have real control; *e.g.,* where the tax was originally unpaid as a result of defalcations by an agent or employee who thereafter suppressed the fact that a tax sale had been held and that the tax lien was about to be foreclosed, or where the owner of the property is an unadjudged incompetent without the protection of a committee. Perhaps at the time the model law was proposed, it was expected that the courts would rescue the taxpayer in cases of such extreme hardship and that the immediate need was for strengthening the position of municipalities. If so, that expectation has not been wholly realized. In City of New York v. Nelson, 309 N.Y. 94, 127 N.E. 2d 827 (1955), *motion to amend remittitur granted,* 309 N.Y. 801, 130 N.E. 2d 602, *aff'd,* 352 U.S. 103 (1956), a case that arose under foreclosure provisions of the Administrative Code of the City of New York closely similar to those of the present Real Property Tax Law, the taxpayers, who were trustees, lost properties worth $52,000. for a total arrears of $887. in water charges. The non-payment of the charges had been caused by the default of the taxpayers' trusted bookkeeper. The Administrative Code was amended after the *Nelson* case arose, to give the New York City board of estimate power under certain conditions to reconvey to the owner after foreclosure. N.Y. Sess. Laws 1956, ch. 481.

The Supreme Court of the United States has held that the New York foreclosure proceeding in rem is unconstitutionally applied as against a person known by the officials of the tax district to be mentally incompetent and without the protection of a guardian, where the only notice to such known incompetent is that given by publication, posting and mailing to her residence in literal compliance with the statute. Covey v. Town of Somers, 351 U.S. 141 (1956), *reversing* 308 N.Y. 798, 125 N.E. 2d 862 (1955). But in Town of Somers v. Covey, 2 N.Y. 2d 250, 140 N.E. 2d 277, 159 N.Y.S. 2d 196 (1957), it was held that the taxpayer's committee had failed to exercise the proper available remedy by an action to set aside the foreclosure deed within the prescribed two-year period although fully aware within that period that the judgment in foreclosure had been in decisions of the Supreme Court of the United States, indicate that possibilities, not wholly unforeseen,[5] of injustice to individual property owners have become realities in the application of in rem tax foreclosure laws and that the New York courts are having difficulty with the problem of construing such legislation so as to permit it to accomplish its main purposes without serious hardship to individuals. As a result, some amendment of the tax foreclosure statute may be desirable.

The object of this essay is to examine briefly the municipal problems related to collection of delinquent taxes that gave rise to enactment of the foreclosure statute and the problems now faced by the New York courts in articulating its provisions with the rest of the law, including constitutional requirements of notice. Because enactment of the foreclosure statute was brought about by partial ineffectiveness of the administrative tax sale as a device for enforcing the collection of delinquent taxes, the evolution of the administrative sale will be reviewed as a basis for appraisal of the foreclosure legislation and the decisions arising under it.

I. Municipal Problems Related to Collection of Real Property Taxes

From the point of view of a municipal government seeking sources of revenue, the tax on real property has had as

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rendered. From that decision, an appeal was dismissed and certiorari denied, 354 U.S. 916 (1957).

[4] City of New York v. Nelson, *supra* note 3; Town of Somers v. Covey, 308 N.Y. 798, 125 N.E. 2d 862 (1955), *motion to amend remittitur granted,* 308 N.Y. 941, 127 N.E. 2d 90 (1955), *reversed,* 351 U.S. 141 (1956); s.c. 2 N.Y. 2d 250, 140 N.E. 2d 277, 159 N.Y.S. 2d 196 (1957), *appeal dismissed and cert. denied,* 354 U.S. 916 (1957), *petition for mandamus denied sub nom.* Covey v. Court of Appeals of the State of New York, 354 U.S. 919 (1957). In the *Covey* case, the taxpayer lost property worth at least $6,500. for $480. worth of taxes and incidental charges.

[5] See Notes, *In Rem Foreclosure as a Cure to Tax Delinquency,* 26 ST. JOHN'S L. REV. 283, 294 (1952); *In Rem Tax Foreclosure in Erie County—Inviolable Title?,* 2 BUFFALO L. REV. 133, 135–139 (1953); *Municipal Corporations—In Rem Tax Lien Foreclosure Proceedings,* 20 BROOKLYN L. REV. 299 (1954).

one of its most attractive features a supposed certainty of collectibility.[6] Since the lien of the unpaid tax is an incumbrance of record impairing marketability, the forces of the private land market tend ultimately to bring about collection when the property is transferred or mortgaged. Also, since land cannot disappear or be concealed, the owner is practically unable to evade the operation of legal mechanisms threatening forfeiture in the event of failure to pay the tax. The theory of the administrative tax sale,[7] the principal type of forfeiture device employed in the United States until about 1930, was that the owner would pay the tax rather than risk the loss of property many times more valuable than the amount of the tax itself.

Actual experience of municipalities, which still rely heavily on the real property tax as a source of revenue,[8] has indicated that the combined threats of impaired marketability and forfeiture by administrative sale may not form a sufficient sanction to prevent the accumulation of considerable quantities of chronically tax-delinquent land in both urban and rural areas, especially during periods of economic depression.[9] The following factors contribute to a failure of chronically tax-delinquent land to become marketable in fact: (1) location of the land in an area that is unwisely zoned or subdivided, (2) accumulation of tax liens on the land to the point where their sum, with interest and redemption costs, exceeds the market value of the land itself, and (3) inability of any one to give a marketable title because of (a) fragmentation of ownership as a result of intestate succession by a number of heirs who cannot be located without great difficulty or expense, and (b) the skeptical attitude of courts, conveyancers and title insurance companies toward titles derived through administrative tax sales.

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[6] See F. T. Aschman, *Dead Land,* 25 LAND ECON. 240 (1949). The merits and demerits of real property taxation generally or of particular theories of assessment are outside the scope of this essay. See, *e.g.,* SAKOLSKI, LAND TENURE AND LAND TAXATION IN AMERICA ch. 21 (1957); Buttenheim, *Unwise Taxation as a Burden on Housing,* 48 YALE L.J. 240 (1938); Comment, *Municipal Real Estate Taxation as an Instrument for Community Planning,* 57 YALE L.J. 219 (1947). Municipal ad valorem taxes on real property have some rational basis in the fact that many of the municipal services that the tax helps to pay quite directly enhance the value of the property taxed; *e.g.,* fire protection, street repairs, maintenance of sewers. See NELSON & ASCHMAN, REAL ESTATE AND CITY PLANNING ch. 6 (1957). For an interesting comment on the chronic lack of correspondence between existing tax systems and fiscal needs, see Mills, *Cultural Lag and the General Property Tax*, 25 SOC. & SOC. RES. 451 (1941).

[7] In New York, this sanction is provided for in N.Y. REAL PROPERTY TAX LAW art. 10 (formerly N.Y. TAX LAW arts. 6 and 7). With minor exceptions, there have been no taxes on real property actually levied by the State of New York itself since 1928, all such taxes being levied by municipalities. Various special tax acts apply to particular counties, and most cities have special tax provisions in their charters. The personal property tax was abolished in New York in 1933. On tax sales generally, see H. K. Allen, *Collection of Delinquent Taxes by Recourse to the Taxed Property,* 3 LAW & CONTEMP. PROB. 397, 401–6 (1936). See also W. Fairchild, *Tax Titles in New York State,* 8 BROOKLYN L. REV. 61 (1938).

[8] N.Y. Legis. Doc., 1959, No. 97, p. 3 (Special Report on Municipal Affairs by the State Comptroller.) According to that report, in fiscal

Land that has poor prospects for profitable economic return after taxes and carrying charges tends to become tax-

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year 1958, local governments in New York State collected real estate taxes amounting to over 1.8 billion dollars. Other sources of municipal revenues were as follows: local non-property taxes, over 460 million dollars; assessments, over 73 million dollars; state aid, over 890 million dollars; federal aid, over 144 million dollars; other revenues, over 436 million dollars. Total municipal revenues for 1958 were over 3.8 billion dollars.

[9] N.Y. STATE PLANNING DIVISION, PROBLEMS CREATED BY THE PREMATURE SUBDIVISION OF URBAN LANDS IN SELECTED METROPOLITAN DISTRICTS IN THE STATE OF NEW YORK (1938) (report to the State Planning Council prepared under direction of P. H. Cornick [hereinafter referred to as CORNICK REPORT]); HILLHOUSE & CHATTERS, TAX REVERTED PROPERTIES IN URBAN AREAS 1–12 (1942); F. L. Bird, *Extent and Distribution of Urban Tax Delinquency,* 3 LAW & CONTEMP. PROB. 337 (1936); COMPTON, REPORT ON FISCAL PROBLEMS OF RURAL DECLINE 21, 25, 101–103, 256 (N.Y. State Tax Commission, 1930); CORNELL UNIVERSITY NEW YORK STATE COLLEGE OF AGRICULTURE, THE PROBLEM OF DELINQUENT TAXES IN RURAL NEW YORK (1935); D. Jackson, *Tax Delinquency of Rural Real Estate,* 3 LAW & CONTEMP. PROB. 347 (1936); NAT'L RESOURCES PLANNING BOARD, TECH. PAPER NO. 8, TAX DELINQUENCY AND RURAL LAND-USE ADJUSTMENT 21–33 (Sept. 1942).

delinquent. Into this category fall submarginal rural tracts, and isolated urban lots that are vacant or contain run-down or obsolete improvements. Vacant areas, urban, suburban or rural, that have been prematurely subdivided or unsuitably zoned may also become delinquent where the possibility of profitable use or resale appears remote.[10] Discussing the problem of chronically tax-delinquent lands in Cook County, Illinois, in 1949, F. T. Ashman wrote:

> In hindsight, it is obvious that had there been effective controls on the one hand and adequate market analysis on the other, much of the land now 'dead' would not have been subdivided, let alone peddled to gullible buyers by the thousands. But neither were controls imposed by municipalities in the Twenties nor did either builders or municipalities pay any regard for adequate analysis of markets and, as a consequence, broad expanses of immature land were subdivided and sold but never achieved economic use and eventually lost even speculative value.[11]

After describing the accumulation of unpaid taxes on such land, Ashman continued:

> Although this land is officially classified as delinquent, the term is itself misleading for it implies that the tax obligation is due, not paid, but expected to be paid. Actually the huge amounts owing on the land were never practical 'delinquencies', for the simple fact that the land has had neither economic use nor continued speculative value to the original owners dictated that the taxes as imposed would never be paid. They are now more truly 'bad debts' incurred by persons who made 'bad buys' in premature or submarginal subdivisions or are the totally neglected debts of the promoter of the abortive subdivision.[12]

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[10] STATE CONFERENCE ON TAXATION (N.Y.), PROCEEDINGS OF SEVENTH CONFERENCE OF LOCAL ASSESSORS, THE EFFECT OF ZONING ON REAL PROPERTY VALUES 182 (1930). Tax delinquency has been particularly marked in "fringes" where differing natural land-use areas merge. NATIONAL RESOURCES PLANNING BOARD, TECH. PAPER NO. 8 TAX DELINQUENCY AND RURAL LAND-USE ADJUSTMENT 21–33 (Sept. 1942).

[11] F. T. Aschman, *Dead Land,* 25 LAND ECON. 240 (1949).

[12] *Ibid.*

As years go by without payment of taxes on a parcel of small value, the accrued liens, covering interest and redemption costs as well as the original taxes, render the property progressively less attractive to potential purchasers, with the result that the offering of the delinquent parcel for tax sale, designed to bring about a transfer of the property to a new private owner able and willing to pay the tax, may fail to achieve its purpose because no purchaser appears. A study made for the New York State Planning Council in 1937 and 1938 in the cities of Rochester, Syracuse, Yonkers, Mt. Vernon, New Rochelle and in forty-seven of the sixty-two towns in Erie, Monroe and Westchester counties showed that of 293,000 vacant lots and lands on the tax rolls, 163,000 were in arrears for taxes and assessments, that the greater part of these were already in arrears in 1931 and that many had accumulated arrears well in excess of assessed valuation.[13] Thus, in the case of land of small value, a paradox develops: the lien for unpaid taxes, designed as a mechanism to create pressure on the owner to pay, contributes to a practical unmarketability that tends to shield him from forfeiture. The situation was formerly made worse by the practice indulged in by many municipalities of "compromising back taxes," a policy which discriminated against conscientious taxpayers and further encouraged tax delinquency.[14]

Of all the causes of chronic tax delinquency, unmarketability of title is probably the most important. In the report made for the New York State Planning Council in 1937 and 1938, it was observed that many parcels of small value had been inherited by several descendants of the original owner, no one of whom had sufficient financial stake in the property to make it worth while to pay taxes.[15] The cost of title searches alone was usually in excess of the value of such parcels. Before enactment of foreclosure statutes, there was no device generally available to municipalties in New York by which title to such land could be cleared without great expense.[16] Even more discouraging from the point of view of municipalities was the long tradition of judicial mistrust of titles derived through administrative tax sales, an attitude that became reflected in the opinion of many conveyancers that such titles are difficult to market in practice, being thought of as unreliable by many potential buyers and lenders.[17]

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[13] CORNICK REPORT, *supra* note 9, at 106–109. It should be noted that the data for the Cornick Report were assembled at a time when the effects of the great depression were still reflected in reduced land values. Compare F. L. BIRD, THE TREND OF TAX DELINQUENCY, 1930–1946 (1947).

[14] Aschman, *supra* note 11, at 243. Under existing law in New York, compromise of taxes by action of municipal legislative bodies is authorized generally in certain cases where the municipality acquired a tax lien or tax sale certificate before 1944. Waiver of interest and penalties is permitted under certain conditions. N. Y. REAL PROPERTY TAX LAW §§ 1092, 1094.

The existence of any large amount of chronically tax-delinquent land increases in several respects the financial burden of the municipality and of those property owners who pay their taxes. The latter must bear a heavier share of the cost of maintaining essential municipal services such as police and fire protection, repair and cleaning of streets and highways, and maintenance of water mains and sewers. In the case of cities, loss of urban land from the private market contributes to premature suburban development with over-extension of utilities and municipal services. Tax-delinquent parcels that could be served economically with existing utilities, fire and police protection, transportation and schools are by-passed in favor of new and distant developments in which those services must be installed at great capital expense and maintained over long lines of communication.[18] Moreover, tax-delinquent land, being usually neglected by its owner, tends to become unsightly; structures located on it often deteriorate, thereby providing a focus for development of blight[19] and depreciating neighborhood property values. According to Hillhouse and Chatters,

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[15] CORNICK REPORT, *supra* note 9, at 188.

[16] Some experiments were tried with fictitious partition suits in an effort to clear the title to such land. They proved to be prohibitively expensive in most cases. Fairchild, *Economic Aspects of Land Titles,* 22 CORN. L. Q. 229, 233 (1936). The earliest modern tax lien foreclosure legislation generally applicable in New York was N.Y. Sess. Laws 1930, ch. 809, which was superseded by N.Y. Sess. Laws 1939, ch. 692.

[17] STATE CONFERENCE ON TAXATION (N.Y.), PROCEEDINGS OF SEVENTH CONFERENCE OF LOCAL ASSESSORS, THE COLLECTION OF DELINQUENT TAXES 199–200; HILLHOUSE & CHATTERS, *op. cit. supra* note 9, at 42–45. Actually, the book rule seems to be that a title to land based upon an administrative sale for delinquent taxes is not unmarketable per se for purposes of specific performance of land contracts. MAUPIN, MARKETABLE TITLE TO REAL ESTATE § 303a (3d ed. 1921). But banks have often declined to lend on such titles unfortified by adverse possession.

> Properties subject to chronic delinquency are often in transition from a higher to a lower land use or vice versa. Ownership is unstable, and private owners are unwilling to make the long-time investment necessary to restore the value inherent in these properties. They consequently deteriorate and, if income-producing, are 'milked' by the owners for their temporary profit, or are put to unwarranted uses.[20]

We turn to an examination of the administrative tax sale, the legal institution that failed to prevent these evils.

II. The Administrative Tax Sale in New York

A. Modern Procedure for Enforcement by Sale; Some General Political Considerations

As observed above, the administrative tax sale alone did not prove successful as a mechanism for getting land out of the hands of delinquent owners and into the hands of new owners able and willing to pay their property taxes. Probably the most important reason for that failure lay in the long judicial tradition of protecting original owners against purchasers of tax deeds through insistence upon exact compliance with the complicated statutes and municipal laws regulating the enforcement of collection. It is tempting to dramatize the long process of evolution of the tax collection law as a struggle between the legislature and the courts, the former in the role of trying consistently to foster marketability of tax titles and the latter stubbornly thwarting the legislative purpose by excessive technicality.[21] A study of the New York cases does not bear out so plain a view of the matter. If there has been a judicial bias in favor of the original owner as against the tax title purchaser, it has had some justification, as we shall see, in the many provisions of the tax collection legislation itself which manifest an attitude of protective concern for the delinquent owner.

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[18] HILLHOUSE & CHATTERS, *op. cit. supra* note 9, at 9.

[19] Tax delinquency is by no means the only factor contributing to those conditions, of course. M. L. WALKER, URBAN BLIGHT AND SLUMS 17–35 (1938).

[20] HILLHOUSE & CHATTERS, *op. cit. supra* note 9, at 9.

Formerly in New York, property taxes were levied by the state as well as by counties, villages, school districts and other municipalities having the taxing power.[22] Since

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[21] *Cf.* N.F. Baker, *Tax Delinquency—Legal Aspects*, 28 ILL. L. REV. 159 (1933), analyzing Illinois developments in that framework.

[22] Before enactment of the New York Real Property Tax Law, the old legislation prescribing the duties of the state department of taxation and finance had survived as article six of the Tax Law. Former N.Y. TAX LAW § 158 stated that the provisions of N.Y. TAX LAW art. 6 should, insofar as not displaced by those of article seven, govern the action of the county treasurer, who was to be treated as having the same rights and duties as the state tax department under article six. Principally because of that provision, defining the powers of county treasurers in tax collection partly by reference to the former powers of the state tax department, article six was not a dead letter even though state taxes on land virtually disappeared after 1928. N.Y. Real Property Tax Law, effective October 1, 1959, repealed N.Y. TAX LAW art. 6 and omitted provisions relating to collection of taxes by any department of the state government. In the new statute, the powers of county treasurers in the collection of taxes were defined directly rather than by reference to the former powers of the state tax department. School district taxes and village taxes are levied and collected under articles thirteen and fourteen, respectively, of the N.Y. Real Property Tax Law. City taxes are levied and collected under the organic laws of the several cities. Special or local laws or ordinances of counties, or city or village charters, are not to be deemed repealed or otherwise affected by the provisions of the Real Property Tax Law. Compare County Securities, Inc. v. Seacord, 278 N.Y. 34, 15 N.E. 2d 179 (1938), holding invalid a local law of New Rochelle purporting to authorize collection of delinquent taxes by sale of tax liens, instead of by sale of the property as provided in the Tax Law and the original city charter.

1928, the state itself has not levied a real property tax of any consequence.[23] Responsibility for assessment and initial collection of property taxes, whether levied by the state or by local governments, has always been vested in local officers in New York, except that special franchises[24] for certain types of public utilities are now assessed by an agency of the state.[25] The duty of enforcing the collection of property taxes by sale of delinquent lands, formerly exercised by the state comptroller and later by the state department of taxation and finance, is now performed by the several county treasurers.

Normally, the procedure for enforcement of collection is as follows: Residents of the city or town in which the property is assessed are personally liable for the taxes levied on that land and, after demand and refusal, may be subjected to having their personal property within the county levied upon by the collecting officer and sold at public auction to satisfy the tax.[26] Whenever any real estate tax is returned to the county treasurer unpaid and remains unpaid for a specified period—in most counties until the first day of August after levy—the county treasurer must advertise the delinquent real estate for tax sale.[27] He must have a list of such real estate published in two designated newspapers once a week for six weeks with a notice that the land will be sold on a specified day at the end of the six weeks at the county court house to discharge the taxes, interest and expenses that may be due.[28] The list must contain, among other things, a brief description of each parcel to be sold and the name of the owner or occupant of each parcel as the name appears on the tax roll; affidavits of due publication must be filed in the offices of the county treasurer and county clerk.[29] The board of supervisors of the county may by resolution authorize and direct the county treasurer to bid in such lands for the gross amount due thereon.[30] At the appointed time the county treasurer must "sell" the delinquent real estate.[31]

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[23] "The State, in actual practice, discontinued general property tax levies after 1928, except for the minor armory and court and stenographers' taxes, which were levied along with the county tax. The armory tax was abandoned by Chapter 932, Laws of 1942, leaving only the court and stenographers' tax. This is a 'chargeback' to the localities for certain judicial expenses paid in the first instance by the State." N.Y. DEP'T OF TAXATION & FINANCE, THE STATE AND LOCAL TAX SYSTEM 4 (1957). The "court and stenographers' tax" referred to in the foregoing passage is the charge against the county for court attendants and others, provided for in N.Y. COUNTY LAW § 218. Ad valorem taxation of personal property in New York was abandoned in 1933. It is prohibited now by statute. N.Y. REAL PROPERTY TAX LAW § 300. N.Y. CONST. art. XVI, § 3 bars ad valorem taxation of intangible personal property.

[24] N.Y. REAL PROPERTY TAX LAW art. 6. "Special franchise" is defined in section 102 of that law.

[25] N.Y. REAL PROPERTY TAX LAW § 202, defining the functions of the "state board," known as the state board of equalization and assessment.

[26] N.Y. REAL PROPERTY TAX LAW § 926. Supplementary proceedings for enforcement of the tax as a personal obligation are provided for in section 990 where a tax in excess of ten dollars is returned by the collecting officer uncollected for want of personal property out of which to collect it. A non-resident owner may not be treated as personally

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liable for the tax. Village of Massapequa Park v. Massapequa Park Villa Sites, Inc., 278 N.Y. 28, 15 N.E. 2d 177 (1938).

[27] N.Y. REAL PROPERTY TAX LAW §§ 1000, 1002. Former N.Y. TAX LAW § 151 provided expressly for sale "at public auction." That provision does not seem to have been carried forward explicitly into the new statute. However, several references in the new law to "bidding" at tax sales suggest that public sale is intended. See, *e.g.,* N.Y. REAL PROPERTY TAX LAW §§ 1004(3), 1006. Judicial sale in an in rem foreclosure must be at public auction, according to section 1136(4).

[28] N.Y. REAL PROPERTY TAX LAW § 1002. The tax collector adds interest at five per centum in making his return to the county treasurer. The amount due includes that interest, plus interest at ten per centum from the first of February after levy, plus expenses chargeable against the parcel.

[29] *Ibid.*

[30] N.Y. REAL PROPERTY TAX LAW § 1008.

[31] The statutory references to "bidding" seem puzzling, at first, in view of the fact that the county treasurer sells at a fixed price, namely, the amount due for taxes, interest and expenses. The statute is obscure on this point. Section 1006 requires the sale to continue from day to day "until so much of each parcel shall be sold" as will be sufficient to pay the amount due thereon as specified in the notice. Apparently "bidding" has reference not to bidding by dollar amounts but to bidding downward

All that the purchaser acquires from the tax sale is a "certificate" which, in effect, signifies an assignment of the tax lien with certain further rights contingent upon ultimate failure by the owner or others to redeem. Before 1930, the certificate holder had no right of foreclosure but might complete his purchase and, after lapse of a year, take a conveyance subject to certain further rights of redemption. Today he may possibly be able to foreclose his lien as in an action to foreclose a mortgage, or he may take a conveyance as formerly.[32] Redemption by the owner, occupant or any other person [33] is permitted at any time within one year after the last day of the tax sale, by payment of the amount of tax, interest and certain other charges to the county treasurer for the use of the tax sale purchaser.[34]

At least three months before the expiration of the one year allowed for redemption, the county treasurer must cause a list of the unredeemed lands to be published for six weeks in two designated newspapers in the county, in-

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for fractional interests or geographic segments of the various delinquent parcels involved. Probably such a sale of fractional interests or segments of parcels occurs chiefly in rural counties.

[32] Whether the owner of a tax lien may foreclose in personam under title two of N.Y. REAL PROPERTY TAX LAW art. 11 depends upon whether the tax district has elected under section 1104 of that law to make that type of foreclosure available. Where the remedy of in personam foreclosure is available to the tax lien owner, he must give notice to redeem and permit redemption before commencing his foreclosure action. N.Y. REAL PROPERTY TAX LAW §§ 1110, 1112. The privilege of in rem foreclosure appears to be reserved for tax districts and not available to private holders of tax liens.

[33] N.Y. REAL PROPERTY TAX LAW § 1010. It has been held that a stranger to the title may redeem under this provision. Blatnicky v. Ciancimino, 1 App. Div. 2d 383, 151 N.Y.S. 2d 267 (1956), *aff'd,* 2 N.Y. 2d 943, 142 N.E. 2d 211, 162 N.Y.S. 2d 38 (1957). Under an earlier version of former N.Y. TAX LAW § 152, from which the present section 1010 is derived, the privilege of redemption was limited to persons having an interest in the property sold.

[34] Redemption is permitted where the purchaser has been the county itself, provided the county has not acquired title in fee. N.Y. REAL PROPERTY TAX LAW § 1016(2).

cluding the amounts necessary to redeem them, and must file an affidavit of such publication.[35] If redemption does not occur within the specified period, the county treasurer must execute upon demand a conveyance under seal to the tax sale purchaser, vesting in him the title in fee, subject to county and state liens for other taxes, to easements affecting the land which were in existence when the tax was levied, and to certain further rights of redemption of occupants or others.[36] Tax deeds are recordable in the county clerk's office.[37] A certificate holder must ordinarily make demand upon the county treasurer for a conveyance within five years after the last day of the sale at which the certificate was purchased; otherwise, ordinarily the certificate becomes void.[38]

Even after receiving a conveyance in fee, the purchaser at the tax sale does not acquire indefeasible title until a further redemption period has expired, in the case of land actually occupied at the end of the one-year redemption period.[39] With certain exceptions, where the land has been so occupied,[40] the occupant or any other person has three years from the date of sale in which to redeem,[41] although that period may be reduced to as little as a year, six months and a day by the tax grantee's duly serving the occupant with a prescribed form of notice [42] and filing an affidavit of service.[43]

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[35] N.Y. REAL PROPERTY TAX LAW § 1014.

[36] N.Y. REAL PROPERTY TAX LAW §§ 1018, 1020. The statutory preservation of easements largely settles a problem that has been troublesome in some other jurisdictions. See Comment, *Extinguishment of Easements and Other Interests by Tax Sale of Delinquent Property*, 20 U. OF CHI. L. REV. 262 (1953).

[37] N.Y. REAL PROPERTY TAX LAW § 1018(2). *But cf.* N.Y. REAL PROPERTY TAX LAW § 1022(3), providing that no conveyance of occupied land shall be recorded until expiration of the time mentioned in the notice of redemption required by that section in cases where the tax grantee seeks by notice to shorten the redemption period.

[38] N.Y. REAL PROPERTY TAX LAW § 1018(3). An exception is made where the certificate is held by the state, the county or the owner of record of the land involved.

[39] N.Y. REAL PROPERTY TAX LAW § 1022. An additional redemption period is also permitted by section 1024 in the case of certain mortgaged land.

[40] "Occupancy," within the meaning of section 1022, requires lawful entry and exclusive possession.

That brief outline of the present tax sale procedure of New York hardly does justice to its complexity even as it stands, and barely suggests the complicated process of interaction between legislative enactments and judicial decisions through which the institution has evolved during the past century and a half.[44] One who seeks merely to comprehend the existing statutory arrangement must reckon with statutes outside the Real Property Tax Law specially applicable to certain counties,[45] with city charters and codes and with provisions of the Real Property Tax Law itself which are applicable to particular counties.[46] It is necessary, also, to remember that the redemption provisions of state tax laws are currently modified in application to service men by the federal Soldiers' and Sailors' Civil Relief Act of 1940.[47]

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[41] N.Y. REAL PROPERTY TAX LAW § 1022. Redemption at this stage requires payment of the consideration money stated in the certificate of sale, plus twenty per centum thereon, plus the amount of any taxes and special assessments, with interest, paid by the tax sale purchaser or those claiming under him.

[42] The cases formerly held that the right to redeem "occupied" land was not terminated in any case until the occupant was duly served with a notice to redeem. In Mabie v. Fuller, 255 N.Y. 194, 174 N.E. 450 (1931), it was decided that those cases were overruled, in effect, by statutory change (N.Y. Sess. Laws 1893, ch. 711). The court of appeals described the conditions in relation to tax titles under the old law as "chaotic." "The grantee in every tax deed was obliged to determine for himself whether the land described in his deed was occupied within the meaning of the statutory definition. The question often presented intricate and difficult questions . . . If the grantee failed to serve a notice to redeem and the courts later decided that the premises were occupied at the time the notice should have been served, his tax deed became worthless. If he served upon the wrong person or failed to serve a legal notice the same effect followed. Often the owner would not assert his right to the premises for years after the tax deed was delivered. The effect was to cast suspicion on all tax titles and lead to protracted litigation." *Id.* at 198, 174 N.E. at 452. It is surprising that this important point was not finally determined until thirty-eight years after the statutory amendment. From 1893 to 1931 it was uncertain in New York whether the tax purchaser's title could become free of redemption rights by lapse of time without notice, in the case of occupied land.

[43] N.Y. REAL PROPERTY TAX LAW § 1022.

[44] The rough outlines of the present system of assessing and collecting real property taxes in New York can be discerned in N.Y. Sess. Laws 1801, ch. 179. Many of the principal features of the modern administrative tax sale appear in 1 N.Y. REV. STAT. pt. 1, ch. 13, tit. 3, art. 3 (1828).

It is not the purpose of this essay to present an exhaustive history of the property tax in New York, but some outline of its development seems necessary as a basis for appraising judicial reaction to particular features of the collection procedure. New York legislation has provided for property taxation in some form since early colonial times, although the state itself has not always levied the tax. During most of the years from 1776 to 1845, the property tax was levied by county boards of supervisors or other municipal legislative bodies rather than by the state. There were, however, concurrent state and county levies in the years from 1799 to 1802, from 1815 to 1826, and during the entire period from 1845 to 1928 except for a few years at the turn of the century.[48] Throughout that long history, the first-line responsibility for administration of the property tax, after levy, has been on local officials: on city, town and village assessors to make the assessments; county boards of supervisors to equalize valuations within the county; city, town, and village collectors to collect the tax and pay the proceeds as required in their warrants; and county treasurers to receive collections, pay creditors of the county as directed by the board of supervisors, and pay to the state treasurer or department of taxation and finance the amount of the state tax when one was levied. Before 1893, the county treasurer had the duty of examining, certifying and transmitting to the state comptroller the accounts of unpaid taxes rendered by collectors in the several tax districts of the county in order that the comptroller might advertise and sell delinquent real estate. In 1893, the duty of selling delinquent land, except land located in certain counties in the forest preserve, was transferred to the county treasurer,[49] where it has since remained.

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[45] See, *e.g.*, the following New York session laws, applicable, as amended, to the collection of taxes in the counties indicated. Cities and villages within these or other counties may operate under variant charter provisions or special laws.

L. 1883, ch. 157 (Jefferson)
L. 1902, ch. 559 (Oneida)
L. 1904, ch. 744 (Niagara)
L. 1920, ch. 311 (Suffolk)
L. 1936, ch. 313 (Livingston)
L. 1936, ch. 602 (Schenectady)
L. 1937, ch. 690 (Onondaga)
L. 1938, ch. 441 (Monroe)
L. 1939, ch. 272 (Nassau)
L. 1942, ch. 812 (Erie)
L. 1948, ch. 852 (Westchester)

[46] N.Y. REAL PROPERTY TAX LAW art. 15.

[47] 54 Stat. 1186 (1940), 50 U.S.C. App. § 560 (1958). A provision of the New York Soldiers' and Sailors' Civil Relief Act, N.Y. MILITARY LAW § 314, is also applicable.

Thus, it has been a peculiarity of the property tax that the primary responsibility for its assessment and collection has rested upon local, rather than state, officials. What bearing has this feature of the property tax had upon the judicial attitude toward tax titles? In one aspect, it might be supposed that local officials, subject to political pressures at close range, would be especially careful to adhere to statutory procedures and to give a delinquent neighbor every consideration permitted by law before proceeding to deprive him of his property by a tax sale. Probably it would have been rare, in the early days when population was small and assessors and collectors were personally acquainted with most resident land owners, that unlawful official action or inaction would be permitted at the local level to prejudice a resident taxpayer. In fact, the early statutes betrayed a concern on the part of the legislature that collectors would not be aggressive enough in the enforcement of the personal liability of resident taxpayers.[50]

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[48] N.Y. DEP'T OF TAXATION AND FINANCE, THE STATE AND LOCAL TAX SYSTEM 3, 4, 25 (1957). The state did not levy for the general fund in 1898 or during the years from 1901 to 1910.

[49] N.Y. Sess. Laws 1893, ch. 711. The exception of lands located within the forest preserve has been eliminated. However, the county treasurer must report such lands to the department of conservation when they have been sold for taxes and not redeemed within a year from the date of sale, in order that the state may purchase them if it wishes. N.Y. REAL PROPERTY TAX LAW § 1019.

On the other hand, after 1813, the statutes relating to assessment and collection of the property tax were complex and frequently amended; the possibilities for official error were numerous, and, in the case of land owned by non-residents of the tax district, any bias on the part of local tax officials was likely to be in favor of the local government and against the taxpayer. It is in the latter situation, involving land of non-residents of the tax district, that one might expect chronic unfairness by local officials. Yet an examination of the tax sale cases in the New York courts during the first half of the nineteenth century, when judicial policy on tax titles was forming, does not indicate that residency or non-residency of the taxpayer was an important factor in the results; indeed, the statements of fact and the opinions leave it a matter of guesswork in nearly every case whether the owner who lost his property by administrative tax sale was a resident or not. Usually he would have been a non-resident, since the resident's duty to pay taxes was enforced by distress of goods in the first instance.[51] There is some pointed comment in one old case [52] to the effect that the collector had not been as diligent as he might have been in locating the owner of land where sale for failure to pay an improvement assessment was threatened. But if the early courts in New York thought it their function to redress an institutional injustice to which non-resident landowners were peculiarly exposed, they never said so in their opinions. There is no evidence in the New York reports before 1850 that the source of judicial skepticism concerning tax titles lay in an urgent need by non-residents for special protection.

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[50] N.Y. Sess. Laws 1801, ch. 179 and N.Y. Sess. Laws 1813, ch. 52 both contain accounting controls designed to discourage leniency by tax collectors toward resident property owners. Assessors and collectors were subject to fines for failure to do their duty.

[51] N.Y. Sess. Laws 1813, ch. 52, § 11.

[52] Sharp v. Speir, 4 Hill 76, 89–91 (1843).

The defaulting owner who, despite his failure to pay taxes, became the object of such solicitude by courts and legislatures, was likely to represent one or the other of two widely different groups in the early years of the last century: he might have been a hard-working farmer who supported his family on the land and voted in the district, or he might have been a non-resident professional speculator, perhaps operating from a distant city, holding and trading documents for thousands of acres of wilderness in the hope that the stream of immigration would flow in his direction.[53] The latter group must have been politically vulnerable away from home, although one suspects that enough legislators and judges were themselves buying and selling land to secure a decent official respect for the speculative point of view. The resident farmer and the non-resident speculator, though far apart politically in most respects, had one aim in common: not losing their land when the recurrent economic depressions made it impossible or embarrassing to pay the taxes on it.[54]

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[53] For an account of the successive phases of land speculation in the United States, see SAKOLSKI, LAND TENURE AND LAND TAXATION IN AMERICA (1957). In the post-Revolutionary period, speculators acquired much land by purchasing Revolutionary veterans' warrants. SAKOLSKI, *op. cit. supra* at 76.

[54] Among the causes for the financial failure of many of the post-Revolutionary land jobbers was the practice of borrowing to make their purchases, with the result that they became "land-poor." Sakolski says: "Their lands lying unused were subject to taxation and, when not sold or rented, became a drain on the income of the possessors. If they could have held out, they would ultimately have been, in most cases, the gainers through the unearned increment. But liquid wealth at the time was limited. Actual cash money was scarce. The exaggerated 'credit economy' could not continue unabated through the ages." SAKOLSKI, *op. cit. supra* note 53, at 81.

This duality in the image of the delinquent taxpayer whose title was threatened by tax sale may well have been responsible for the failure of the New York legislature to make it unmistakably clear from the first that it really wanted the delinquent owner's land to be taken away from him forever if he failed long enough to pay taxes on it. By a remarkable series of accidents in the sequence of the early cases, the New York courts moved inexorably in the direction of undermining the efficacy of the tax deed by making the delinquent owner's right of redemption practically perpetual, until finally, in 1850, the legislature had to intervene to save the administrative tax sale from complete destruction as an institution. The story of this early jurisprudence in New York is interesting and sheds much light on later developments. Undeniably it would have justified a mid-nineteenth century conveyancer in concluding that the judiciary were hostile to tax titles.

B. The Tax Sale in New York from 1788 to 1850

The earliest property tax statutes in New York did not provide for sale of delinquent land as a measure for enforcement. The session laws of 1788 provided for a tax on real estate, to be enforced ordinarily by distress of goods and chattels found on the premises.[55] If none could be found, the collector was authorized and required to sell "at public vendue," after prescribed notice and public posting, so much of the timber, wood or grass as should be sufficient to pay the tax and charges. The purchaser was authorized, at any time within six months of the sale, to enter and remove such timber, wood or grass. It is not surprising that this enforcement device was soon abandoned; it is hard to imagine one more likely to lead to breach of the peace. The session laws of 1799, likewise, did not provide for sale of tax-delinquent land but did provide that any tax levied on real estate should be a lien until paid, and that such lien should be considered as a mortgage; if the lien remained unpaid for a year or more, the "attorney general" of the district was authorized to recover the tax as if payment thereof had been secured by a mortgage.[56] In the laws of 1801, it was again provided that the lien for real property taxes should be "considered as a mortgage," but, in addition, a provision for sale of the land was included under certain conditions in the event of default in payment for three years.[57]

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[55] N.Y. Sess. Laws 1788, ch. 65.

In the Revised Laws of 1813,[58] the administrative tax sale was fully introduced, and the provision for treating the tax lien as a mortgage disappeared, not to be restored to the general law of New York until 1930.[59] For one hundred and seventeen years, except where local charters and special laws provided further sanctions, the administrative tax sale was to be the sole mechanism of enforcement of the real property tax against non-residents of a tax district, and against residents where distress of goods and chattels failed to bring about payment. The statute of 1813 set the basic pattern which has since governed the collection and enforcement of real estate taxes in New York. There have been many changes in detail, of course, but even the modern mechanisms of foreclosure in personam, foreclosure in rem and the bulk tax sale[60] are essentially superimposed on the system established in 1813.

Briefly, that system called for the following acts: assessment by assessors of taxable real and personal property of inhabitants of each tax district and preparation of assessment rolls; public posting of notice of hearing of objections to assessment; examination and correction of rolls by the county board of supervisors and equalization of valuations among the towns; return of corrected rolls to the town clerk with warrants to collect, including authority to each collector to distrain goods and chattels of those residents who failed to pay the taxes assessed; personal demand for payment by the collector on inhabitants assessed, followed, in the event of failure to pay, by distress and sale of goods and chattels in possession of the inhabitant taxed, whether or not they belonged to him; return by the collector to the county treasurer of a verified account of taxes remaining due; certification by the county treasurer of the correctness of the collector's account, and transmittal by the treasurer to the state comptroller of each collector's account. Taxable land of non-residents was listed separately[61] and by description in the assessment roll, the tax on non-resident land being considered in rem. It was provided also that if the taxes assessed to a resident should be returned unpaid because of removal of the occupant or "in default of goods and chattels of the occupant to satisfy such tax," the land should be "described" in the following year's assessment roll. Since the land of residents was not ordinarily "described" in the assessment roll (the tax being initially in personam as to residents and based on both their real and personal property), this provision seems to have required a listing of such land of a delinquent resident with the lands of non-residents in the subsequent assessment roll. If this interpretation is correct, it was under this provision that it became possible ultimately to reach the land of a resident and have it sold for taxes with non-residential lands. Curiously, this obscure but important provision seems never to have been the subject of reported litigation.

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[56] N.Y. Sess. Laws 1799, ch. 72, 28th paragraph.

[57] N.Y. Sess. Laws 1801, ch. 179, 18th paragraph.

[58] N.Y. Sess. Laws 1813, ch. 52.

[59] N.Y. Sess. Laws 1930, ch. 809, superseded in 1939 by N.Y. TAX LAW art. 7–A and now by N.Y. REAL PROPERTY TAX LAW art. 11.

[60] N.Y. REAL PROPERTY TAX LAW art. 10, tit. 2.

Each collector sent to the county treasurer an account of unpaid taxes on non-resident land; the treasurer examined and certified that account and forwarded it to the state comptroller. If the return of unpaid taxes on lands of non-residents exceeded the amount of taxes due to the state under any state levy, the comptroller caused the surplus, after deducting any balance that might be due from the county on account of taxes previously rejected, to be paid out of the state treasury to the treasurer of the county; and the whole amount of taxes so assumed by the state was to be collected by the comptroller. This procedure amounted virtually to an assignment, by the county to the state, of the liens for unpaid taxes on non-resident land. Whenever a tax charged on lands returned to the comptroller remained unpaid for two years from the first day of May following the year in which it was levied, the comptroller was required to advertise and sell the land at public auction in Albany, as provided by law. At the sale, the purchaser received a certificate from the comptroller, similar to the one he receives today from the county treasurer, and if no one redeemed within two years after the sale, the comptroller was required to execute to the purchaser, in the name of the people of the state, a conveyance of the real estate sold. The statute provided that this conveyance should vest in the grantee an absolute estate in fee simple and that it should be ''conclusive evidence that the sale was regular according to the provisions'' of the statute.[62] On the whole, the New York tax collection statute of 1813 was drafted with remarkable care and skill and deserved a better fate than was to be its lot.[63]

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[61] The fact that the tax on real property was originally coupled to a tax on personalty may have fostered indirectly the distinction in assessment procedure between residents and non-residents. Personal property was assessed only against residents.

The pivotal questions of law about which the litigation over tax titles in New York was to revolve during the first half of the nineteenth century turned out to be the evidentiary questions foreshadowed by the language of the act that the comptroller's deed should be ''conclusive evidence'' of regularity of the tax sale: How far back into the events leading up to the comptroller's sale would the conclusiveness of the statutory presumption carry? Would it give the tax grantee's title prima facie validity against attack based upon failure of proof that the grantee or comptroller had complied with the redemption provisions of the statute? And where would the burden of proof lie: with the tax grantee and his successors to show compliance with all provisions of the statute, or with the original owner to show non-compliance?

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[62] N.Y. Sess. Laws 1813, ch. 52, § 17.

[63] In N. F. Baker, *Tax Delinquency—Legal Aspects*, 28 ILL. L. REV. 159, 167 (1933), it is said: "The statutes which deal with the general problem of delinquency and with the sale of delinquent lands appear to be entirely lacking in plan and organization." The context suggests that the writer was referring chiefly to early Illinois statutes. It would not be a proper characterization of the New York statute of 1813 or its successor in 1 N.Y. REV. STAT. pt. 1, ch. 13 (1828).

By a stroke of bad luck from the point of view of later tax sale purchasers, the first case that arose under the statute of 1813 was one in which all considerations of justice lay in favor of the original owner and against the tax grantee. In *Jackson v. Morse,*[64] an ejectment action by the tax grantee against the original owner whose land had been sold by the comptroller supposedly for non-payment of taxes in 1811 and 1812, the defendant proved on trial that, in fact, the taxes had been paid to the collector and that it was through error on the part of the assessors that a return had been made to the contrary. In reliance upon the county treasurer's return, the comptroller had sold the land. The supreme court of New York held easily in favor of the original owner. The statutory "conclusive presumption" of regularity of the comptroller's sale did not go so far as to make the returns to the comptroller, on the basis of which he sold, conclusive evidence of the fact of non-payment of the original taxes. The validity of the sale and conveyance, said the court, depend necessarily upon the contingency of non-payment, and proof of payment was thus competent to defeat the sale and deed. The parol evidence rule did not bar such proof. The tax grantee must look to the state for relief. The court dropped a remark indicating its belief that the returns to the comptroller were prima facie evidence of the fact of non-payment of the original tax so as to justify the comptroller in selling the land "as an officer, in the discharge of his duty."[65] Unfortunately, the court cited in support of its conclusion *Stead's Executors v. Course*,[66] decided by the Supreme Court of the United States, thereby establishing a precedent in New York tax title cases for citing federal cases applying statutes of other jurisdictions. The federal line of decisions, we shall see, was strongly adverse to tax title holders. Although the result in *Jackson v. Morse* seems correct and just, the long-range effect of the court's opinion was to open up the comptroller's deed to attack based on occurrence or non-occurrence of various events prior to the tax sale.

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[64] 18 Johns. R. 441, 9 Am. Dec. 225 (1821).

[65] *Id.* at 442, 9 Am. Dec. at 226. Justice Woodworth, who wrote the opinion, had been one of the revisers of the statute of 1813. (See Cady,

The series of cases in the Supreme Court of the United States thus introduced into New York jurisprudence by the opinion in *Jackson v. Morse* must be examined. *Stead's Executors v. Course* arose in the federal circuit court for Georgia, apparently on diversity grounds. Plaintiffs sought to subject certain lands in possession of defendants to the payment of a debt owed to plaintiffs by the former owners of the land. Defendants set up title by a tax deed executed in 1799 by the county collector of taxes when the former owners failed to pay their Georgia taxes on the land. Plaintiffs replied that the tax sale to defendants was collusive and fraudulent. The circuit court had sustained defendants' plea. The Supreme Court reversed, holding that the collector's deed alone was not sufficient to sustain the plea and that it would be competent for plaintiffs to show that the collector had exceeded his authority by selling the whole tract of land when a small part of it would have been sufficient for the taxes in question. In short, it was held that the circuit court should not have decided the case on demurrer since the validity of the tax sale had been drawn into question by the pleadings. The rationale given was far more moderately phrased than that which was to appear in some of the later cases:

J., dissenting, in Leggett v. Rogers, 9 Barb. 406, 425 (1850).) Woodworth's dictum, with its favorable implications for tax purchasers, should have been entitled to special weight on the question of legislative purpose.

[66] 8 U.S. (4 Cranch) 403 (1808).

> It would be going too far to say that a collector selling land with or without authority, could, by his conveyance, transfer the title of the rightful proprietor. He must act in conformity with the law from which his power is derived, and the purchaser is bound to inquire whether he has so acted.[67]

From the next three sentences in Marshall's opinion, tax grantees might even have derived some hope for their cause in the future:

> It is true that full evidence of every minute circumstance ought not, especially at a distant day, to be required. From the establishment of some facts, it is possible that others may be presumed, and less than positive testimony may establish facts. In this case, as in all others depending on testimony, a sound discretion, regulated by the law of evidence, will be exercised.[68]

But any satisfaction that tax grantees might have derived from that language was dispelled by the first part of Marshall's next sentence:

> But it is incumbent on the vendee to prove the authority to sell, and the question respecting the fairness of the sale will then stand on the same principles with any other transaction in which fraud is charged.

What did the first clause mean? Must tax grantees, as part of their case in chief, always go behind the tax deed and establish the validity of the tax and assessment and performance of the many official acts prescribed by collection and enforcement statutes preliminary to the conveyance?

Marshall's own answer came eleven years later in *Williams v. Peyton's Lessee,*[69] a case arising under the federal direct property tax of 1798. In ejectment by the original patentee of lands in Kentucky against a purchaser at a sale made for non-payment of the federal tax, after plaintiff exhibited his title, defendant gave in evidence the books of the supervisor of the district, showing that the tax on the lands in question had been charged to the plaintiff and that they had been sold for the non-payment thereof. Defendant also gave in evidence a deed executed by the marshal of the district pursuant to the federal statute, and he proved by an agent of the plaintiff that there were tenants on the land and that plaintiff had not paid the tax or redeemed the land. Upon this evidence, the federal circuit court instructed the jury, in effect, that the tax purchaser had to prove due advertisement for taxes and performance of other statutory requisites, or he made out no title. Defendant's counsel moved to instruct the jury "that the deed and other evidence produced by them" was prima facie evidence of compliance with statutory requirements. The motion was denied, the jury found for the plaintiff and the defendant went to the Supreme Court on writ of error. The Supreme Court affirmed. The Court rejected the defendant's contention that a deed executed by a public officer was prima facie evidence that every act that ought to precede the deed had been performed. The federal tax statute did not say, "These conveyances shall be deemed prima facie evidence of the validity of the sale." The collector had no general authority to sell, but only a special power to sell in the particular cases described in the act. "It is a naked power, not coupled with an interest. . . ." [70] The agent must pursue the power or his act will not be sustained by it. The party who sets up a title must furnish the evidence necessary to support it. Facts *in pais* upon which the validity of the deed depends should be examined by him before he becomes a purchaser and the evidence of them preserved as a necessary muniment of title. Marshall indicated rather clearly his distaste for tax sales:

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[67] 8 U.S. (4 Cranch) at 413.

[68] *Ibid.*

[69] 17 U.S. (4 Wheat.) 77 (1819).

> Is the nature of the transaction such, that a Court ought to presume in its favour any thing which does not appear, or ought to relieve the party claiming under it from the burthen of proving its correctness? [71]

And what was a tax grantee to do to collect and preserve his evidence? As far as evidence of publication was concerned, the court suggested that he might preserve the gazettes in which required publications of notice of sale had been made. This ignored the purchaser's problem of marshaling evidence that the collector had also duly advertised the tax for two months in six different public places in the tax district, as required by the federal statute. The statement in *Stead's Executors v. Course* that it is "incumbent on the vendee to prove the authority to sell" was quoted without its moderating context. A Kentucky rule treating tax deeds as prima facie evidence of legality of sale was noticed but held inapplicable under the federal statute.

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[70] *Id.* at 79.

[71] 17 U.S. (4 Wheat.) at 80.

The decision in *Williams v. Peyton's Lessee* seems indefensible. It virtually excluded tax deeds from any benefit of the ordinary presumption of regularity of official acts,[72] and it made the federal property tax practically unenforceable against a non-resident owner of vacant land [73] by imposing upon any tax grantee a crushing burden of collecting evidence to show the validity of every official act leading up to the execution of his tax deed.[74] That burden was far greater on the tax grantee than the corresponding burden on a person claiming title through exercise of a special power by an ordinary agent—the analogy mentioned in Marshall's opinion—because of the large number of official acts involved in assessing and collecting the property tax, not all of which are memorialized by official documents of record, such as public posting of notices of sale. Perhaps the closest analogue to the tax sale in Marshall's time was the sheriff's sale. The purchaser at a sheriff's sale had the burden of showing a judgment rendered by a court of competent jurisdiction and a valid execution issued thereon as a basis for claiming title in an ejectment action against the original owner;[75] but having established those elements he was able to rely on a rebuttable presumption of regularity in the sheriff's return and certificate of sale.[76] His burden was at least of finite dimensions.

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[72] See 9 WIGMORE, EVIDENCE § 2534 (3d ed. 1940). Wigmore says: "This presumption is more often mentioned than enforced; and its scope as a real presumption is indefinite and hardly capable of reduction to rules."

[73] Both resident and non-resident owners were subject to distress and sale of personalty in enforcement of the federal tax of 1798. See Parker v. Rule's Lessee, 13 U.S. (9 Cranch) 64, 69 (1815).

[74] The Supreme Court did later delimit this requirement slightly in Ronkendorff v. Taylor's Lessee, 29 U.S. (4 Pet.) 349 (1830), by holding that the tax grantee did not have to exhibit proof of the regular appointment of the assessors as part of his affirmative case.

It is possible that the decision in *Williams v. Peyton's Lessee* was reached without adequate reflection about the public need for a workable system of property tax enforcement. Perhaps the court noticed the fiscal problem but regarded it as no longer practically important because of the abandonment of the real property tax by the federal government.[77] It seems more likely, however, that the result was the product of a combination of three sentiments: (1) aristocratic distaste for the practice of purchasing tax titles, an activity that derives profit, in effect, from other people's misfortunes, (2) aristocratic distrust of the good faith and accuracy of tax collectors as a class, and (3) a sentiment that forfeiture of land is simply too harsh a sanction for enforcing taxes at least without the safeguard of judicial supervision. This latter sentiment has its roots in an old tradition of English and American law, expressed in the maxim that equity abhors a forfeiture and applied in the law of mortgages and pledges. That tradition is also expressed in our tort and criminal law in the general principle that liability or punishment should ordinarily be proportioned to moral fault. The moral fault involved in a failure to pay taxes may not have seemed great enough in the eyes of early American judges to justify the taking of a man's land as the consequence, except where legislation has made it absolutely clear that forfeiture must be endured. Even viewed sympathetically with that tradition in mind, *Williams v. Peyton's Lessee* seems to have gone too far in the direction of undermining the enforcement of the property tax.[78] It would have been more respectful of governmental fiscal needs to let the original owner carry the burden of showing fraud or illegality in the tax grantee's position.[79] *Stead's Executors v. Course*[80] had gone no farther.

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[75] See 2 BLACKWELL, TAX TITLES § 1135 (5th ed. 1889).

[76] Neilson v. Neilson, 5 Barb. 565 (1849) (*semble*).

[77] The federal government had levied direct property taxes (apportioned among the states) in 1798, 1813, 1815 and 1816. It levied again later in 1861. It is interesting that the federal government should have relied so little on the real property tax. There is much evidence of general agreement in the Constitutional Convention of 1787 that a tax on land was deemed a "direct tax" within the meaning of the Constitution. C. J. Bullock, *Direct Taxes and the Federal Constitution*, 10 YALE REV. 6, 25–29 (1901). Members of the Convention who, like Franklin, were influenced by physiocratic notions, would have regarded the tax on land favorably. Apparently Franklin had misgivings about the practicability of a federal land tax in a large, sparsely settled country. (Bullock, *supra* at 25.) The experience with slow collection under the early federal acts may have discouraged the use of a federal land tax. Bullock, *The Origin, Purpose and Effect of the Direct-Tax Clause of the Federal Constitution*, 15 POL. SCI. Q. 452, 470–474 (1900). The writer finds no evidence as to whether Marshall's handling of the enforcement problem had any bearing on the abandonment of the federal land tax.

These early Supreme Court decisions had a powerful influence upon the law of tax titles throughout the United States.[81] For several years it seemed that the well-drawn tax collection statute of New York might be proof against the crippling federal doctrine. As late as 1831, the supreme court of New York conceded by way of dictum[82] that perhaps a comptroller's deed might be an exception to the rule of the federal cases requiring affirmative proof by the tax grantee of all facts necessary to support his title, in view of the provision in the New York statute that such a deed "shall be conclusive evidence of the regularity of the sale." But the fates were against the elaboration of a better rule in New York. In 1827, the New York Supreme Court had occasion, in *Jackson v. Shepard*,[83] to pass upon the validity of a tax deed made by a federal collector after a sale under the federal direct property tax of 1813. The plaintiff, relying upon the recitals in his tax deed as proof of compliance on the part of the collector with the conditions precedent to his authority to sell and convey the land, was non-suited by the trial judge. The supreme court of New York affirmed upon the authority of *Williams v. Peyton's Lessee* and other federal decisions. The greater part of Marshall's opinion in *Williams* was quoted in a footnote. The court said it saw no material difference between the federal tax statute of 1813 and that of 1798 under which *Williams* had been decided and remarked that the principles on which the *Williams* decision was founded were "of general authority and application," and seemed "incontrovertible." [84] *Jackson v. Shepard* was clearly distinguishable because the federal statute involved contained no provision comparable to the "conclusive evidence" language of the New York statute. But the strong expressions of approval of the federal decisions and their rationale indicated the general trend of judicial sentiment on the subject.[85]

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[78] John Marshall had been the attorney in Virginia for Robert Morris, one of the leading land speculators in the country during the early federal period. Marshall's brother, James, married Morris's daughter. 2 BEVERIDGE, THE LIFE OF JOHN MASHALL 202–3 (1916).

[79] Williams v. Peyton's Lessee is a good example of how adjudication of a dispute between private litigants on a question of private law—procedural law, at that—may have a far-reaching effect in matters of great public importance.

[80] 8 U.S. (4 Cranch) 403 (1808).

[81] 2 BLACKWELL, TAX TITLES §§ 1120–1139 (5th ed. 1889).

[82] Jackson v. Esty, 7 Wend. 148, 149 (N.Y. Sup. Ct. 1831).

The next case in New York involving the validity of a tax title presented the question, not of proof of conditions precedent to execution of the comptroller's deed, but of the effect, after the deed was issued, of the tax grantee's failure to give proper notice to redeem to an occupant in possession of the land. *Jackson v. Esty* [86] became the first of a long line of cases involving the special redemption rights of the owner of occupied land. The premises in question had been sold for taxes in accordance with the Revised Laws of 1813, and the state comptroller had executed a deed to plaintiff's grantors pursuant to the sale and in compliance with a certificate of the sale given by the comptroller. At the date of the comptroller's deed, the premises were in the actual possession and occupancy of one Day, who did not, however, claim title to the land. The applicable New York statute required that when land sold for taxes was occupied at the time the tax deed was given, the tax grantee must formally notify the occupant of the purchase and specify the amount of money necessary to redeem the land. Plaintiff proved that Day, on being informed of the purchase by plaintiff's grantors, said he had no title to the land and expressed a wish to buy from them. This evidence was offered as equivalent to a waiver of the required notice of purchase. The trial judge, Esek Cowen, had charged the jury that the negotiations amounted to a waiver of the notice, and the jury found a verdict for the plaintiff.

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[83] 7 Cow. 88, 17 Am. Dec. 502 (N.Y. Sup. Ct. 1827).

[84] *Id.* at 92, 17 Am. Dec. at 505.

[85] Counsel for the winning defendant in Jackson v. Shepard was Esek Cowen, who was himself soon to become a member of the New York supreme court.

[86] 7 Wend. 148 (N.Y. Sup. Ct. 1831).

On hearing by the full bench, the defendant's motion for new trial was granted on the ground of error in the charge. The court repeated Marshall's statement in *Williams v. Peyton's Lessee*[87] that the party who sets up a title must furnish the evidence necessary to support it and stated the general rule that even the recitals in a deed of the performance of the acts necessary to validate the conveyance are not sufficient but must be proved independently of the deed. The court did concede that perhaps a comptroller's deed might be "an exception to this particular" in view of the statutory language that such a conveyance should be conclusive evidence of the regularity of the sale, but it denied that such a deed could be evidence of acts that were to be done subsequently. The purchaser takes a contingent title, said the court, and where the land is occupied, that title depends further upon a condition subsequent to be performed by the purchaser. To complete such a title "it is as necessary to prove the service of notice and the omission to redeem, as it is to prove the sale."[88] The court ruled that the occupation referred to in the statute did not have to be by the owner or by any one in privity with the owner. On the crucial question whether the occupant could by his acts dispense with the notice required by statute, it seemed clear enough to the court that no waiver by a mere occupant could bind the owner. The court's theory of the legislative purpose was expressed as follows:

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[87] 17 U.S. (4 Wheat.) 77 (1819).

> The object of the legislature was to raise a revenue with the least possible sacrifice to the citizens. The possessor of real estate is bound to pay the taxes, and when not possessed, the proceeding must necessarily be against the property. The legislature foresaw that it might happen that the property might not be occupied when assessed, and yet be occupied when sold for taxes; and that by mistakes which might be made by the returning officers, property might be returned as *non-resident*, when in truth it was occupied. They wisely provided, therefore, that the purchaser should ascertain the fact at his peril, and give notice when necessary. The purchaser must therefore do every act necessary to perfect his title; he must not only give notice, but he must make proof of that fact, and that proof is the evidence upon which the comptroller is to act in the last instance.[89]

The court concluded by reasserting the doctrine that where proceedings are instituted to change the title to real estate by operation of law, the requirements of the governing law must be strictly pursued.

The court's analysis in the *Esty* case looks plausible, but it does not meet the problem created by the fact that the comptroller had given a deed which the statute provided expressly should vest in the grantee an absolute estate in fee simple. If the further statutory requirement of a notice of redemption to the occupant of occupied land was simply in the nature of a condition subsequent on delivery so that failure to perform it would divest the tax grantee of an already acquired title, why could not such condition be effectively waived by the occupant? There was nothing in the statute that required the tax grantee to make sure that the notice to redeem came to the owner's attention after it had been given to the occupant. True, the owner need not be bound by the occupant's waiver, in the sense that the owner should still have been allowed to redeem within the statutory period regardless of what the occupant did. But to insist that the tax grantee go through the solemn business of serving the occupant with formal notice to redeem when the occupant, denying all claim of right, had offered to treat with the tax grantee, seems to place form above substance. The only justification for the result would seem to be that without the grantee's affidavit of service of the notice and the comptroller's certificate of such service the grantee's record title would not be clear. The decision in the *Esty* case did have the virtue of prompting tax grantees to perfect the record of their titles.

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[88] *Supra* note 86, at 150.

[89] *Ibid.*

It remained for Cowen to reveal the full dimensions of the technical problem of statutory construction which *Esty* had glossed over. Writing for the full court in *Bush v. Davison*,[90] Cowen expressed frankly the trouble he had originally had with cases arising under the New York tax statute. He said:

> The difficulty with us circuit judges, who were called upon in the first instance to act upon the statute, lay in the novel form under which the condition came to us. A deed from the state, authorized by statute, and made conclusive of its own regularity, purporting to transmute the title, and actually delivered out to the purchaser, is yet made a mere escrow *to be available* on the performance of a precedent condition. Looking at the ordinary legal effect of such a deed, under the statutory provisions, we should say it carried the title, which would be defeasible by the actual occupant paying the tax, after notice to him. . . .[91]

Cowen concluded that the statutory requirement of notice to the occupant to redeem and of certification by the comptroller of non-redemption were actually conditions precedent to the tax grantee's acquiring any title at all. Cowen was led to this conclusion by the consideration that under the *Esty* case and a case decided the year before,[92] there was no legal title in the tax grantee upon which he could recover in ejectment against an occupant of the land until the conditions of notice and non-redemption had been satisfied. "The occupant has more than an equity," said Cowen, "he has the legal right."[93] In view of the *Esty* decision, the situation of the tax grantee was to be compared with that of a mortgagee having only an equitable lien instead of a legal estate. Having persuaded himself that the formal notice of purchase to the occupant was really a "condition precedent" to the acquisition of title by the tax grantee, Cowen felt satisfied with the decision of the *Bush* case that such notice could not be dispensed with in respect of an unoccupied part of the total tract sold for taxes where another part of the same tract had been occupied when the tax deed was given. In other words, he thought that the duty of notifying the occupant was not divisible between occupied and unoccupied portions of the tax-sold tract.

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[90] 16 Wend. 550 (N.Y. Sup. Ct. 1837).

[91] *Id.* at 554.

The result in *Bush v. Davison* seems sound enough, although it required tax purchasers to assure themselves that there was no occupant on any part of the tax-sold tract, under pain of losing their entire purchase. In fact, it had been anticipated by a decision made in the preceding year[94] in which the conclusion of indivisibility of the tax title had been reached by an argument drawn more directly from the statutory language. The opinion in *Bush* is worthy of note for the struggle it reveals to reconcile the obvious drift of the tax title cases with the provisions that the tax grantee was to acquire an absolute title in fee and that his deed was to be conclusive evidence of regularity of the sale. So far, in New York, the tax grantee had been defeated in every reported case in which he relied solely upon his comptroller's deed.

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[92] Comstock v. Beardsley, 15 Wend. 348 (N.Y. Sup. Ct. 1836), holding that an occupant of only part of the land sold for taxes was entitled to redeem the whole tract and hence was entitled to notice for that purpose. As long as the tax grantee had failed to serve such occupant with notice, he acquired no title even to the unoccupied part of the land.

[93] Bush v. Davison, 16 Wend. 550, 556 (N.Y. Sup. Ct. 1837).

[94] Comstock v. Beardsley, *supra* note 92.

Up to this point, the vital question of the evidentiary position of the comptroller's deed had been only partially answered.[95] Almost as if contrived for the purpose of answering the question, a series of cases decided between 1840 and 1850 undermined the position of the tax grantee on this issue until finally, in 1850, the legislature had to intervene.[96] The real property tax was becoming practically unenforceable against non-residents who chose to litigate.

The first case in the series was *Sharp v. Speir*.[97] The controversy involved the valildity of a deed given by the village of Brooklyn of a lot on which an assessment for a well and pump had not been paid. The supreme court of New York, per Bronson, J., held that the deed was invalid on the ground that the organic law of the village did not authorize the sale of lands for failure to pay assessments for improvements, as distinguished from taxes. The case would have been unimportant for the development of the law of tax titles had the court not elected to discuss additional questions raised by the parties. The rule of strict construction of statutory powers was announced and elaborated in the following language, which was borrowed largely from *Williams v. Peyton's Lessee* and which was to make trouble for tax purchasers in the years to follow:

> It is not a case for presuming that public officers have done their duty, but what they have in fact done must be shown . . . As the statute [the organic law of the village of Brooklyn] has not made the conveyance *prima facie* evidence of the regularity of the proceedings, the fact

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[95] *I.e.*, it had been held not to be conclusive evidence of the regularity of proceedings before and after sale, but whether it was prima facie evidence of such regularity was still undecided.

[96] N.Y. Sess. Laws 1850, ch. 183 and ch. 298, § 83.

[97] 4 Hill 76 (N.Y. Sup. Ct. 1843).

> that they were regular must be proved, and the *onus* rests on the purchaser. He must show, step by step, that every thing has been done which the statute makes essential to the due execution of the power. It matters not that it may be difficult for the purchaser to comply with such a rule. It is his business to collect and preserve all the facts and muniments upon which the validity of his title depends.[98]

Several passages in Bronson's opinion indicate his disapproval of putting into the hands of municipal officers the power to bring about the forfeiture of private property:

> It has become so common of late to take private property in one form or another without the consent of the owner, that corporations are not always very careful to look at their charters; or if they are examined, the powers conferred are construed very liberally.[99]

* * * *

> Every statute derogatory to the rights of property, or that takes away the estate of a citizen, ought to be construed strictly. It should never have an equitable construction.[100]

* * * *

> These assessment sales for real or fancied improvements sometimes fall very heavily upon the owners of city and village property. . . . The loss resulting from a sale most commonly falls upon absent owners, who have no notice until it is too late—upon women, who are not accustomed to watch the movements of a corporation and its officers—and upon children, who want discretion to defend and protect their rights.[101]

Bronson dealt curtly at the end of the opinion with the possibility that the decision might impair titles derived through assessment sales:

> We were told by the defendant's counsel that the conclusion at which we have arrived would disturb many titles. If that be so we cannot help it. If there have been many sales for making wells and pumps in Brooklyn, I

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[98] *Id.* at 86.

[99] 4 Hill at 81.

[100] *Id.* at 84.

[101] 4 Hill at 85.

> can only say that there have been many wrongs, and we have no choice but to redress such injuries when they are judicially brought before us.[102]

Sharp v. Speir was immediately followed by a closely similar case, *Sharp v. Johnson,*[103] involving the validity of a deed under a sale for an unpaid street assessment in Williamsburgh. Again the assessment purchaser lost; again Bronson wrote the opinion, pointing out a multitude of defects in the procedure that had been followed.[104] The court declined to pass upon the question whether the provision of the organic law of Williamsburgh that unpaid street assessments should be liens on the affected property implied a power of sale to enforce the lien. The court intimated that foreclosure in equity was the sole method of enforcement.[105] This suggestion of a preference for courts over administrative officials as the institution to do the job of enforcing municipal liens is consistent with the attitudes described above as underlying the decisions of the Supreme Court of the United States in the earlier cases on tax titles. Indeed, if we look ahead to the adoption of the tax lien foreclosure statutes of our own time, we may say that the courts succeeded, by a century of steady pressure, in compelling the legislature to accommodate the tax enforcement procedures to that institutional preference. Bronson's suggestion of equitable foreclosure, contained in *Sharp v. Johnson,* is some evidence for the thesis, suggested above, that it was the forefeiture aspect of the tax sale that chiefly troubled the early courts and hardened their hearts against administrative tax titles.

Between 1845 and 1850, persons holding deeds under sales for taxes or street assessments sustained an impressive series of losses in the New York courts. In *Striker v.*

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[102] *Id.* at 91.

[103] 4 Hill 92, 40 Am. Dec. 259 (N.Y. Sup. Ct. 1843).

[104] "I am weary with pointing out defects in these proceedings," Bronson says near the end of the opinion, "and will go no further." *Id.* at 103, 40 Am. Dec. at 266.

[105] 4 Hill at 103, 40 Am. Dec. at 266.

Kelly,[106] the court for the correction of errors ruled, one senator dissenting, that the making by the collector of an affidavit of demand for payment, under the tax collection statute for New York City, was an essential condition to exercising the power to sell for assessments or taxes under the provisions of that statute; and that the tax lease (comparable to the usual tax deed) given by the city was not sufficient evidence that such an affidavit had been made to support the sale without further proof of the making of such affidavit before the premises were advertised for sale. This decision came close to being a precedent that would defeat the grantee under a comptroller's deed unless he proved affirmatively the due performance of every official act from the levying of the tax up to the making of the conveyance. The only distinction lay in the fact that a local rather than a general law was involved.

But the courts were not in the habit of drawing close distinctions for the benefit of tax purchasers. Thus, when the issue of the evidentiary status of the comptroller's deed was squarely presented to the New York Supreme Court in *Varick v. Tallman,*[107] it was treated as having been virtually settled by the *Striker* decision. The plaintiff in *Varick* produced and proved her comptroller's deed and then rested, relying on the conclusive presumption of regularity provided by the statute. Judgment by the trial court in her favor was reversed by the full bench on the authority of the old federal cases, the *Striker* decision and dicta culled from the already long line of New York cases unfavorable to tax and assessment grantees. In the same year, the court of appeals held in *Tallman v. White*[108] that the statutory provision declaring the comptroller's deed to be conclusive evidence of the regularity of the sale did not extend to proceedings antecedent to the sale itself; such a deed was not conclusive evidence of the comptroller's power to sell. Accordingly, it was open to the original owner in an ejectment action to show that there had been a misdescription of the premises in the original assessment roll, which had been carried forward through all proceedings and into the deed. The original owner did not show that he had actually been misled by the error, but the court thought that he could have been, since he might not have been apprised of the sale for taxes, and that was enough.

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[106] 2 Denio 323 (N.Y. Ct. for Correction of Errors 1845).

[107] 2 Barb. 113 (N.Y. Sup. Ct. 1848).

[108] 2 N.Y. 66 (1848).

So far, despite frequent amendments of the tax collection law in other respects,[109] the legislature had made no move to repel the judicial narrowing of the conclusive presumption of regularity of the comptroller's sale. In fact, it had made one change in redemption procedure that created new trouble for tax purchasers. Originally the Revised Statutes provided that whenever any land sold for taxes and conveyed by the comptroller should *at the time of such conveyance* be actually occupied by any one, the grantee must serve written notice on the occupant stating what was necessary to redeem the land from the sale and stating that unless it was redeemed within the prescribed time the conveyance would become absolute.[110] In order to complete his title in case of such occupancy, the tax grantee had to file with the comptroller an affidavit of service of such notice on the occupant. But a law enacted in 1830[111] superimposed upon that requirement a further provision that where lands sold by the comptroller were occupied *at the expiration of the two years given for redemption from the last date of the comptroller's sale for taxes* (whether by then conveyed by the comptroller or not), the tax purchaser had to serve notice to redeem upon the occupant within one year from the expiration of the time of redemption, and to file the evidence thereof with the comptroller within one month after such notice. The time for redeeming the land, when occupied at the end of the two years from the time of the sale, was six months from and after the filing of the evidence of such notice with the comptroller. The net effect of these provisions was that the tax purchaser might lose all rights with respect to land occupied at the end of two years from the close of the tax sale if, within the time specified by the act of 1830, he failed to serve the occupant with the required notice or to file the evidence of such service with the comptroller. Where the case did not come within the purview of the act of 1830, it seemed that the only effect of a neglect to give such notice was to extend the time for redemption of the land and the perfecting of the title of the purchaser.

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[109] One of those amendments had increased the period of redemption after sale from one year to two years. N.Y. Sess. Laws 1844, ch. 266, § 1.

[110] 1 N.Y. REVISED STATUTES pt. 1, ch. 13, tit. 3, art. 3 § 83 (1828).

[111] N.Y. Sess. Laws 1830, ch. 108.

In *Bank of Utica v. Mersereau*,[112] one of the last cases decided by the old court of chancery, it was held that even where the occupant of the land at the end of two years from the time of the comptroller's sale was the tenant of the tax grantee himself, the notice to redeem had to be given. Surprisingly, Chancellor Walworth seemed to regard the deed as prima facie evidence of ownership in the tax grantee, but he held, among other things, that the deed could be overthrown by evidence that the land had been actually occupied at the end of two years from the date of tax sale and that the statute of 1830 had not been complied with. Confronted with such a statutory snarl on this vital matter of redemption rights, the courts of the time cannot be blamed too much for inferring that the legislature had no clear desire to promote the marketability of tax titles.

By 1850, the New York decisional law stood in the following position: Neither the new court of appeals nor the old court for the correction of errors had yet squarely decided whether the comptroller's deed was prima facie evidence of regularity of proceedings before and after the sale;[113] the supreme court had held in *Varick v. Tall-*

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[112] 3 Barb. Ch. 528, 49 Am. Dec. 189 (N.Y. 1848).

[113] The court of appeals finally decided this question in the negative (*i.e.*, against the tax grantee) in a case arising under the law as it existed before the amendment of 1850. Beekman v. Bigham, 5 N.Y. 366 (1851). The court declined to distinguish Striker v. Kelly, 2 Denio 323 (N.Y.

man,[114] and again in *Leggett v. Rogers,*[115] Cady, J., dissenting, that it was not. The court of appeals had held in *Tallman v. White*[116] that the deed was not conclusive evidence of the propriety of official actions leading up to the sale. From a decision in 1848[117] denying validity to a New York City lease made under a sale for an unpaid street assessment, it was a foregone conclusion that the high court would refuse to regard a tax deed as conclusive evidence of the purchaser's compliance with the requirements for giving notice of redemption to occupants.[118]

When at last the legislature acted, it did so in a rather confusing manner. By chapter 183 of the session laws of 1850, it amended the Revised Statutes to create a rebuttable presumption of validity of the comptroller's acts leading up to the making of a tax deed. By chapter 298 of the same session laws, the entire portion of the Revised Statutes relating to collection of taxes on lands of non-residents (including the new amendment by chapter 183) was repealed and a new statute covering the subject was enacted, in which was included the following provision:

> § 83. Such conveyance shall be executed by the treasurer and county judge of the county in which the land was sold . . . in such form as the comptroller shall direct; and such conveyances, and all conveyances hereafter executed by the comptroller, of lands sold by him for taxes, shall be presumptive evidence that the sale, and all proceedings prior thereto from and including the assessment of the land, and all notices required by law to be given previous to the expiration of the two years allowed to redeem, were regular, according to the provisions of this act, and all laws directing or requiring same, or in any manner relating thereto.

Sup. Ct. 1845) and cited Varick v. Tallman, 2 Barb. 113 (N.Y. Sup. Ct. 1848), with approval.

[114] 2 Barb. 113 (N.Y. Sup. Ct. 1848).

[115] 9 Barb. 406 (N.Y. Sup. Ct. 1850).

[116] 2 N.Y. 66 (1848).

[117] Doughty v. Hope, 3 Denio 594, *aff'd,* 1 N.Y. 79 (1847).

[118] The applicable statute provided that the lease "shall be conclusive evidence of the regularity of the sale." 3 Denio at 602.

The provision for execution of tax deeds by the treasurer and county judge proved unworkable and disappeared in 1855,[119] but the presumption of regularity has been carried forward, essentially in the form of the act of 1850, through all amendments of the tax collection law and is still in effect.[120] The purport of the amendment was simple enough: It did not protect the tax deed from all attack, but it took the tax purchaser out of the impossible position in which the *Varick* and *Leggett* decisions in the New York Supreme Court had placed him, of having to prove affirmatively the due performance of all official acts leading up to the conveyance. The rationale of Marshall's decision in *Williams v. Peyton's Lessee* was repudiated. The amendment of 1850 was a clear warning from the legislature that the courts, when adjudicating in this area, must not let their zeal to protect private property rights carry them to the point of making the entire system for collection of real estate taxes unworkable.[121] To what extent the courts heeded that warning will form the subject of our next inquiry.

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[119] Execution of tax deeds by the comptroller was restored by N.Y. Sess. Laws 1855, ch. 427, §§ 63, 65. Both the 1850 statutes mentioned in the text were superseded and repealed by N.Y. Sess. Laws 1855, ch. 427, § 92.

[120] N.Y. REAL PROPERTY TAX LAW § 1020(3).

[121] The tendency of the New York decisions up to 1850, especially the *Varick* and *Leggett* decisions, was clearly in that direction. The only judge up to 1850 who seems clearly to have recognized the threat to the property tax system implicit in the rigorous requirements of proof that were being placed on the tax grantee was Daniel Cady of the New York Supreme Court. His long and illuminating dissent in Leggett v. Rogers, 9 Barb. 406, 413 (N.Y. Sup. Ct. 1850), a case tried before the amendment of 1850 was in effect, is the only judicial opinion in New York articulating the difficulties of operating a system of land taxation under the federal doctrine, which had been followed in the *Varick* case and was being followed by the majority in the *Leggett* case itself. Cady had purchased a few tax titles himself, as he admitted at the beginning of his opinion. The following excerpts from his opinion are of particular interest: "If the court should hold that a purchaser at a sale for taxes can not show a title without calling witnesses to prove that the town, county and state officers, have each done the several acts required of them by the law, for the assessment and collection of taxes, it will be equal to a decree annulling all former sales for taxes, and prohibiting them in future. For who would purchase lands for unpaid taxes, if he can not,

Certain features of the development of the law of tax titles in New York up to 1850 should be pointed out: First,

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after the lapse of ten, twenty, thirty or forty years, prove his title without proving—otherwise than by a conveyance from the comptroller—that all the acts of town, county and state officers concerned in the assessment and collection of taxes have been performed in exact conformity to the statutes in relation to that subject?" *Id.* at 415. "To call upon the purchaser to prove all the preliminary proceedings in the assessment and collection of taxes, before the account of unpaid taxes is made to the comptroller, would in ninety-nine cases out of a hundred defeat his claim. The men who were assessors ten, twenty, thirty or forty years ago, and who put up the notices required by sections 19 and 20, are not now to be found. Some are gone to Iowa, some to California, but most of them to their graves. So of the collectors, where are they? To send a person who purchased land at a comptroller's sale twenty, thirty or forty years ago, to seek for a collector of that time, with his tax list and warrant, would be about as idle as to tell him to go into the wilderness between the St. Lawrence and Mohawk rivers, and find the track of an indian made in the revolutionary war." *Id.* at 419. "If the collection of taxes be necessary, and uncultivated lands must be sold for the payment of them, the public interest and the interest of those whose lands must be sold, demand that the law should be so construed as to secure the greatest competition at the sale; but surely it is not the way to encourage bidders to attend the sale, to assure them that there is not more than one chance out of one hundred, that they can secure a title for lands sold for taxes. Nor is it the way to encourage the owners of unoccupied lands to pay the taxes thereon, to tell them that if the comptroller does go through the form of a sale, there will be ninety-nine chances out of a hundred that they will keep their land and others pay the taxes." *Id.* at 421. "It is difficult to believe that the legislature intended that there should be so much difficulty and uncertainty, as to the title of land sold by the comptroller for the non-payment of taxes. If they did, they contrived a most effectual mode of exhausting the treasury, and exempting uncultivated lands from effectual taxation.

"There are parts of chapter 13 which show that the legislature did not intend that purchasers at the comptroller's sales for unpaid taxes should be defrauded. By sections 89 and 90, if it be discovered, either before or after the conveyance is given, that the sale, for *any cause,* is invalid, the comptroller is authorized to refund the purchase money and interest. There is no limitation as to the time within which application may be made to the comptroller to repay the purchase money and interest.

"Would it be enough to warrant the comptroller in repaying the purchase money and interest, if the purchaser shall prove by the affidavit of in none of the New York cases so far considered had the issue of marketability of a tax title been presented for adjudication. All the cases but two[122] were ejectment actions directly trying the title, and in those two no question of marketability was suggested. Second, in none of the cases up to 1850 had any representative of any government been a party or intervened. Hence, it is not surprising that the institutional impact of the decisions in this area was not noticed, at least in the official opinions, until relatively late, and then only in Cady's dissent in *Leggett v. Rogers* in 1850.[123] Another feature of the early development was the absence of any distinction between the position of the immediate purchaser from the comptroller and that of subsequent purchasers in the chain of title. There had been little occasion to consider the possibility of such a distinction in the early cases so far considered, since all but one of them[124] involved controversies between the original owner or his successors in title and the immediate grantee, or a lessee holding of the immediate grantee, under a sale for unpaid taxes or municipal assessments. In the

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his agent that diligent search has been made for the original assessment roll and none can be found, and that no evidence whatever can be discovered showing that the assessors ever put up the notices necessary by the 19th and 20th sections? If that evidence would be enough, the state will want some other revenue than that arising from the canal, to meet all the calls on the treasury. And certainly if the legal presumption be, that the town and county officers have not done their duty, very slight evidence in aid of that presumption, ought to be enough to justify the comptroller in repaying the purchase money and interest. But should an application for repayment be made to him, he would point to the return made by the county treasurer, and say, 'that is prima facie evidence that the tax was assessed and is unpaid; you must prove that that return is false or founded in mistake, or I can not listen to your application.' And if that answer on the part of the comptroller would be correct, the plaintiff in this cause is entitled to judgment." *Id.* at 439.

[122] Bank of Utica v. Mersereau, 3 Barb. Ch. 528, 49 Am. Dec. 189 (N.Y. 1848), was a suit in equity to set aside certain conveyances as fraudulent. Beekman v. Bigham, 5 N.Y. 366 (1851), decided on the basis of the law before the 1850 amendment, was a trespass action.

[123] *Supra* note 121.

[124] Bank of Utica v. Mersereau, *supra* note 122.

one case involving a remote grantee, no notice was taken of that fact.[125] Conceivably, a theory might have been worked out treating the immediate tax or assessment grantee as holding a voidable title in the case of at least some kinds of defective proceedings, with a power to pass good title to a bona fide purchaser. But the early federal decisions characterizing tax titles as void for irregularity in the exercise of the government's ''special power'' had silently blocked any such approach to the problem.

Finally, the earliest tax title cases had generally involved wilderness or rural tracts rather than urban lots.[126] There was no hint up to 1850 of the effect that practical unmarketability of tax titles would have later in complicating the problems of municipal administration.

[*To Be Continued*]

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[125] *Ibid.*

[126] Urban cases started to appear with Sharp v. Speir, 4 Hill 76 (N.Y. Sup. Ct. 1843) (assessment for wells and pumps in Brooklyn); Sharp v. Johnson, 4 Hill 92 (N.Y. Sup. Ct. 1843) (street assessment in Williamsburgh); Striker v. Kelly, 2 Denio 323 (N.Y. Ct. for Correction of Errors 1845) (street assessment in New York City); Doughty v. Hope, 3 Denio 594, *aff'd,* 1 N.Y. 79 (1847) (street assessment in New York City).

Restitution of Taxes Paid Under Mistake in New York

John C. Welsh, Jr. *

The rules in New York which determine the right of a taxpayer to recover taxes or assessments paid under mistake of either law or fact may be readily summarized. In general, it may be said that recovery is permitted when payment is based upon a mistake of fact or, if based upon a mistake of law, is induced by duress or coercion. As a corollary, restitution is denied where payment is deemed "voluntary." The application of these rules has sometimes led to harsh results. In the following pages, an attempt has been made to collate the relevant New York cases elaborating these often reiterated concepts, illustrate some of the difficulties encountered when an attempt is made to classify the decisions, and indicate some of the methods by which an injured taxpayer may obtain relief.

The leading New York case permitting recovery for payment made under a mistake of fact is *Mayer v. Mayor*,[1] where claimant, the owner of an urban lot, numbered "28," received a notice of liability for recent paving expenses directed generally to the owner of lot numbered "27," the adjoining lot. Observing that the notice requested payment by a date stated, the claimant paid the tax, at the time supposing that it related to his lot. Upon ascertaining later that the tax paid was not applicable to his own lot, claimant sought repayment from the city comptroller and upon the refusal of his request maintained an action to recover the amount of his payment. The court of appeals allowed recovery, indicating that in its opinion the money had been paid under a mistake of material fact and that there was no evidence that the position of the city had been changed as a result of the payment or that collection of the assessment could not still be obtained from the adjacent land owner who had the legal obligation to pay it.[2]

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[1] Mayer v. Mayor, 63 N.Y. 455 (1875).

The same rule was followed in *Lesster v. Mayor*,[3] where a former owner of property paid taxes upon a parcel which had been acquired by the city in condemnation proceedings within the preceding twelve months. Recovery was allowed although the report of the commissioners in condemnation was confirmed seven months before payment. Plaintiff taxpayer testified that he did not know that the report had been confirmed and title had vested in the city. The municipality claimed that refund should be denied because its position would be changed by repayment in that the state had been paid its share of the tax in advance of collections and the city could not get a rebate from the state on the amount collected relating to plaintiff's property. On two grounds, the court rejected the city's attempt to bring the case within the rule, suggested in the opinion in the *Mayer* case,[4] that refund be denied in the event of a change of position by the municipality. The first and less satisfactory ground from the court's point of view was that the city as owner of the property should not have made payment to the state if it was not obligated to do so. The second and, to the court, better ground, was that the exemption of city property from tax is dependent upon its being put to a public use. In the *Lesster* case, the taxpayer was being allowed to collect rents from the condemned land in lieu of the city's paying interest on the condemnation award. Although title was technically in the city, the use and operation of the premises was substantially the same as it had been prior to condemnation; thus it seemed that the property should not be exempt from tax. The court observed that cases refusing recovery because the party receiving payment could not be restored to his original position were instances where the recipient was entirely free from mistake and that it was freedom from mistake and not inability to restore the recipient to his original position that was the basis for the decisions denying recovery.[5]

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[2] The principles herein discussed have also been applied in non-tax cases. In Hathaway v. County of Delaware, 185 N.Y. 368, 78 N.E. 153 (1906), plaintiff lent money on the faith of what purported to be a note executed by the county treasurer which in fact was a forgery. The proceeds from the note having been paid to the county to discharge the forger's debt, plaintiff was held entitled to recover the sum lent on the ground of mutual mistake of fact, in the absence of any showing that it would be inequitable to require a refund.

[3] Lesster v. Mayor, 33 App. Div. 350, 53 N.Y.Supp. 934 (1898), *aff'd,* 161 N.Y. 628, 55 N.E. 1097 (1899).

[4] Mayer v. Mayor, *supra* note 1, at 457.

Not all attempts to obtain relief have been maintained against the taxing authority which benefited by the error in question. In *Baranowski v. Wetzel*,[6] plaintiff paid taxes on lots having the same record description as those owned by her but through error of the tax clerk the assessments were taken from the wrong volume; because of the duplication of numbers, the payments were applied to lands of strangers. After unsuccessfully seeking reimbursement from the owners benefited, plaintiff brought an action in equity to impress a lien on the lots. Holding that payment was not voluntary but was made through mistake,[7] the court adjudged plaintiff entitled to a lien on the premises with a right of foreclosure, in the event of failure to discharge the lien. It is quite conceivable that in this instance an action against the municipality to recover the payment would have been unavailing. Subsequent to the payments erroneously made, title was transferred upon foreclosure sale, and the new owner was apparently a bona fide purchaser who had relied on the accuracy of the tax record which indicated that payment had been made. Under these circumstances, the municipality probably would have been unable to recover the tax from the new owner and the exception to permitting recovery indicated in the *Mayer* case would have become applicable.[8]

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[5] For early cases discussing mistake principles in tax cases, see Allen v. Mayor, 4 E.D. Smith 404 (N.Y. 1855), and Fleetwood v. City of New York, 2 Sandf. 475 (N.Y. 1849).

[6] Baranowski v. Wetzel, 174 App.Div. 507, 161 N.Y.Supp. 153 (1916).

[7] The court cited Mayer v. Mayor, *supra* note 1, and Lesster v. Mayor, *supra* note 3.

Once the characterization has been made that the mistake is one of fact and not of law, the courts have little difficulty in allowing the taxpayer to recover his payment[9] with the possible exception, relating to change of position, discussed in the *Baranowski* case.[10] However, this characterization has not always been easy to make. In the few cases where mistakes of fact and law are deemed intermingled, the erring taxpayer has been generally allowed relief.[11]

The presence or absence of a mistake of fact may thus be of crucial importance to the taxpayer attempting to obtain refund of the tax or assessment paid. If payment is made exclusively under mistake of law without protest, duress or coercion, such payment is considered to be voluntarily made and recovery by the taxpayer is not permitted. Payments made under mistake of fact are considered to be made involuntarily since the taxpayer cannot fully assent to payment when he makes the payment under misapprehension of material facts. In mistake-of-law cases, a consideration of the mental state of the payor has not been deemed of such importance. The basis offered for the denial of recovery where payment is made under mistake of law is the conclusive presumption that everyone knows the law.[12] In fact, it is quite likely that the payor did not know the law, and, if he had known the law, payment would not have been made. Thus, we are forced to rely on this presumption of questionable validity to produce the assent to payment which is treated as lacking in mistake-of-fact cases. When the payor has actual knowledge of the illegality of the tax, this difficulty does not arise. It appears reasonable that a party who has been subjected to an illegal demand and who has knowledge of such illegality should not be allowed to pay without using resistance when it is legally possible to do so and later be permitted to maintain an action to recover the payment at a time when it may be much more difficult for the adverse party to sustain its position.[13]

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[8] See Curnen v. Mayor, 79 N.Y. 511 (1880), where assessments against certain lots were paid by non-owners who erroneously believed themselves to be the owners. After regular entry of payment was made, the mistake was discovered and an action begun to recover the payment. Judgment was rendered for the plaintiff with the consent of the city and the notation of payment previously made was stricken from the record. After the taxes were paid but prior to their recovery, the premises were sold to a purchaser for value who relied upon the assessment book which indicated that all taxes were paid. The court of appeals applied the rule that when the assessment roll has been erroneously discharged, its lien cannot be restored so as to affect the rights of bona fide purchasers who relied on the truth of the record. Referring to Mayer v. Mayor, *supra* note 1, the court indicated that if any question of change of ownership or rights of a bona fide purchaser had been present, the result might have been different and the city might have been justified in refusing to return the tax payment.

[9] Mayer v. Mayor, *supra* note 1; Lesster v. Mayor, *supra* note 3; Betz v. City of New York, 119 App.Div. 91, 103 N.Y.Supp. 886 (1907), *aff'd,* 193 N.Y. 625, 86 N.E. 1122 (1908).

[10] Baranowski v. Wetzel, *supra* note 6.

[11] Adrico Realty Corp. v. City of New York, 250 N.Y. 29, 164 N.E. 732 (1928); One Fifty-seven Prince St. Corp. v. Michelini, 62 N.Y.S.2d 148 (Sup.Ct.), *aff'd,* 271 App.Div. 777, 66 N.Y.S.2d 406 (1946). In the latter case, the grantor of realty was allowed to recover from the grantee a reduction in assessment allowed the grantee by the city taxing authorities. At the closing, the amount of the lien, as both parties then believed it to be, was deducted from the purchase price. The allowance to the grantee was held to be made under mutual mistake of fact and law. Since the amount of the allowance was double that of the assessment, defendant was held unjustly enriched by the excess.

In application of the rule denying recovery of a voluntary payment of a tax made under a mistake of law with full knowledge of the facts, the courts necessarily consider the question of what renders a payment voluntary. The New York decisions are in accord that payment is considered voluntary when the tax or assessment is void upon its face [14] or, if valid upon its face but in fact void, when payment is made with full knowledge of the facts causing such invalidity.[15] Proof of duress or coercion are sufficient, of course, to remove a given case from the effect of the voluntary-payment rule.

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[12] Bilbie v. Lumley, 2 East 470 (1802); see Betz v. City of New York, *supra* note 9.

[13] Peyser v. Mayor, 70 N.Y. 497, 26 Am.Rep. 624 (1877).

[14] McCue v. Bd. of Supervisors, 162 N.Y. 235, 56 N.E. 627 (1900); Phelps v. Mayor, 112 N.Y. 216, 19 N.E. 408 (1889); Fleetwood v. City of New York, 2 Sandf. 475 (N.Y. 1849); see Matter of Village of Delhi, 201 N.Y. 408, 94 N.E. 874 (1911).

A simple and frequently used method of indicating the involuntary character of a tax payment is protest. Taxes paid under protest have been generally held recoverable although the recovery has often been based on other evidence of duress or coercion.[16] While lack of protest is not necessarily conclusive, it is sometimes considered as evidence that payment was voluntarily made.[17] Protest, however, was the decisive factor in *Title Guarantee & Trust Co. v. City of New York*,[18] where thirty-four payments of submetering taxes imposed pursuant to the New York City utility tax law were held not recoverable since made without protest while seven later payments made under written protest, although otherwise voluntary, were allowed to be recovered.[19] The advantage of protest to the taxing authorities is thought to be that the act of protest puts the municipality on notice that the legality of the tax or assessment has been questioned, so that it may provide for a possible future defense of the validity of the payment with the realization that upon the failure to sustain it the payment may be refunded.[20] Of course, legislation may expressly permit refund of taxes illegally or erroneously collected although payment was made without duress, coercion or protest,[21] thus mitigating some of the harshness engendered by application of the voluntary-payment rule.

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[15] Tripler v. Mayor, 125 N.Y. 617, 26 N.E. 721 (1891); *s.c.,* 139 N.Y. 1, 34 N.E. 729 (1893). The court found that the facts surrounding the payment were not such that an inference of ignorance of the extraneous facts invalidating the assessment could be fairly drawn. The burden was on the taxpayer to show that payment was made without knowledge of the facts which made the assessment illegal. Matter of Village of Delhi, *supra* note 14.

[16] Adrico Realty Corp. v. City of New York, *supra* note 11; Vaughn v. Village of Port Chester, 135 N.Y. 460, 32 N.E. 137 (1892); Bruecher v. Village of Port Chester, 101 N.Y. 240, 4 N.E. 272 (1886).

[17] Goldberg v. City of New York, 260 App.Div. 61, 20 N.Y.S.2d 801 (1940), *aff'd,* 285 N.Y. 705, 34 N.E.2d 386 (1941).

[18] 265 App.Div. 304, 38 N.Y.S.2d 715 (1942), *aff'd,* 290 N.Y. 910, 50 N.E.2d 301 (1943).

[19] See Dutchess County Mut. Ins. Co. v. City of Poughkeepsie, 51 Hun 595, 4 N.Y.Supp. 93 (Sup.Ct. 1889), where plaintiff was allowed to recover personal property taxes paid under protest upon proving that it was exempt from such taxes by statute.

Duress, sometimes referred to as coercion in fact, occurs where there exists a threat of taking person or goods or where payment of money is necessary to obtain immediate liberty of the person or possession of property.[22] In contrast, coercion in law stems from the force of a judgment where the court had jurisdiction of the person and the subject matter and where the party against whom the judgment is obtained cannot resist the execution of it unless it is later reversed. Under these circumstances, a debtor may make prompt payment to avoid additional expense caused by delay without bringing himself within the rule of voluntary payments.[23] The determinations of assessors have been regarded as coercive in law, since, unless void on their face, they have the force of a judgment which a party is legally bound to pay.[24] To be involuntary, payment must be made by a party with an interest in the property to protect, which interest would be imperiled by enforcement of the tax lien. Thus, a widow who paid taxes assessed against her husband's property during his lifetime was held to be a volunteer since she was entitled to take her dower interest unburdened by taxes or assessments payable out of her late husband's estate.[25]

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[20] See Goldberg v. City of New York, *supra* note 17, at 63, 20 N.Y.S.2d at 802; *cf.* Mercury Mach. Importing Corp. v. City of New York, 3 N.Y.2d 418, 426–7, 144 N.E.2d 400, 404, 165 N.Y.S.2d 517, 521 (1957).

[21] See People *ex rel.* Edison Elec. Illuminating Co. v. Wemple, 141 N.Y. 471, 36 N.E. 506 (1894), where relator was allowed to recover payment of an illegal tax even though voluntarily made pursuant to provisions of the corporation tax act. In Van Antwerp v. State, 218 N.Y. 422, 113 N.E. 497 (1916), respondent stockbrokers were allowed a refund for excess stamps affixed by them to stocks sold for customers pursuant to a statute later declared unconstitutional. Defendant's objection was based upon its claim that no loss was caused to the respondents. Voluntariness of the payment was not discussed.

[22] See Tripler v. Mayor, 125 N.Y. 617, 26 N.E. 721 (1891); Peyser v. Mayor, *supra* note 13; RESTATEMENT, RESTITUTION § 75 (1937).

[23] See Peyser v. Mayor, *supra* note 13; RESTATEMENT, RESTITUTION § 72, comment *d* (1937).

[24] Peyser v. Mayor, *supra* note 13. For an illustration of payment made

Where the taxing authorities have undertaken active legal proceedings to enforce payment of the tax, the taxpayer may be justified in paying to halt the enforcement procedure.[26] Payment made after levy and threatened sale of personal property was held to be made under duress.[27] However, when proceedings are undertaken, it appears necessary that they be done in conformity with the law and directed toward the collection of the tax. In an extreme case holding payment of an alleged illegal assessment to be voluntary, the taxpayer after failing to pay the tax was subjected to proceedings which terminated in an order granted by the county judge which directed that the tax be paid under penalty of issuance of an execution against the taxpayer for the amount. After service of a copy of the order, the tax was paid. In an action to recover the tax, payment was deemed voluntary upon the ground that the order of the county judge was void because unauthorized by statute.[28] It is extremely doubtful whether plaintiff who made payment upon service of the order should have been presumed to know of its invalidity. It would appear

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under coercion of law, see Vaughn v. Village of Port Chester, *supra* note 16. The tax was paid under protest, but that fact was not relied upon by the court as a basis for its conclusion.

[25] Vanderbeck v. City of Rochester, 122 N.Y. 285, 25 N.E. 408 (1890). See also McCue v. Bd. of Supervisors, *supra* note 14, where repayment was held voluntary when made by a son for nine successive years on land owned by his mother.

[26] Poth v. Mayor, 151 N.Y. 16, 45 N.E. 372 (1896).

[27] Dutchess County Mut. Ins. Co. v. City of Poughkeepsie, *supra* note 19.

[28] Bailey v. Buell, 50 N.Y. 662 (1872).

that such a payment should be deemed to be coerced. It has also been held that payment to a collector exhibiting a warrant to an agent of the taxpayer was voluntarily made because the warrant did not give or purport to give the collector authority to collect the tax compulsorily and that the demand made by the collector was only a demand for voluntary payment and did not carry with it an actual or apparent power to enforce payment.[29] Such payment is to be contrasted with payment to an officer with an enforceable warrant which he threatened to execute. In the latter situation, payment has been held to be made under duress.[30]

The mere fact that a lien exists and that the municipality had authority at any time to institute the collection proceedings may be sufficient to allow recovery where the invalidity of the tax or assessment does not appear on its face. In such case, payment is considered involuntary although no attempt at collection or enforcement has been undertaken.[31] In order for this rule to be applied, the payor must have no knowledge of the invalidity of the assessment and there must be nothing to put him on inquiry about such invalidity.[32] The burden of proof is upon the plaintiff to show that payment was made in ignorance of the invalidity of the tax.[33] The court pursued a similar analysis in a case where the owner of bank stock, although exempt from the tax assessed on such shares, paid the tax in order to remove the lien resulting from non-payment. The court considered the payment to be involuntary because of the fact that any transfer of the stock would have to be made subject to the lien. The owner was thus deprived of an essential element of ownership.[34]

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[29] New York & H. R.R. v. Marsh, 12 N.Y. 308 (1858).

[30] Bruecher v. Village of Port Chester, *supra* note 16.

[31] Tripler v. Mayor, 139 N.Y. 1, 34 N.E. 729 (1893); *cf.* Redmond v. Mayor, 125 N.Y. 632, 26 N.E. 727 (1891), where the lien of a repaving assessment existed seventeen years prior to payment. The court of appeals refused to accept the conclusion of the trial court that the payors were ignorant of the illegality of the assessment at the time payment was made.

[32] "The general principle that the owner of land incumbered by an assessment for a local improvement, apparently valid, enforcible in due course and at the will of the municipality, by a sale of the premises, may in good faith pay the assessment and relieve the land from the encumbrance, and thereafter, on discovering that the assessment was unauthorized and illegal, may recover back the money paid, is consonant with the sentiment of justice. . . . The ordinary citizen is not advised of the steps which precede the imposition of an assessment. He finds his property assessed and liable to be sold for non-payment of the assessment, and having innocently and in ignorance paid the charge, there is no injustice

Threat of a penalty may be sufficient to constitute duress [35] but it is necessary that avoidance of the threatened penalty be the reason for the payment. In *M & T Trust Co. v. City of Buffalo*,[36] payment of an illegal city tax on a national bank was held to be voluntary despite a provision for a $100-a-day penalty since payment was not made until five years after the penalty term began to run. The threat of the penalty obviously did not serve as the inducement for payment. When payment was made in the *M & T Trust Co.* case, it was made as the result of a compromise settlement between the taxpayer and the municipality, and the court refused to disregard such an agreement which was fully executed and voluntarily arrived at. Where payment was made at the request of a mortgagee who refused to

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in requiring a return to him of the money. If he had notice or was put on inquiry before the payment was made, and failed to pursue it, and there was no coercion in fact, he occupies a different position." Tripler v. Mayor, *supra* note 31, at 5, 34 N.E. at 730.

[33] Tripler v. Mayor, *supra* note 22, at 631, 26 N.E. at 725.

[34] Aetna Ins. Co. v. Mayor, 153 N.Y. 331, 47 N.E. 593 (1897). The court took the position that plaintiff could properly enforce its right to an exemption by paying the tax to expunge the lien and then maintaining an action to recover the tax. Another basis for the decision was offered in that there was no voluntary payment because the tax was paid by the banks without express authority from the plaintiff shareowner. See also People *ex rel.* Am. Exch. Nat'l Bank v. Purdy, 196 N.Y. 270, 89 N.E. 838 (1909); *s.c.*, 199 N.Y. 51, 92 N.E. 232 (1910).

[35] Adrico Realty Corp. v. City of New York, *supra* note 11.

[36] M & T Trust Co. v. City of Buffalo, 266 N.Y. 319, 194 N.E. 841 (1935).

make a loan which would consummate a voluntary partition action, payment was treated as voluntary.[37]

Remedies

Depending upon the type of tax paid and the particular relief sought by the taxpayer, several alternatives are available after payment of a tax or assessment illegally or erroneously collected because of mistake, duress or coercion. Article seven of the New York Real Property Tax Law [38] provides for a proceeding to review an assessment of real property and substitutes this proceeding for the writ of certiorari, the former remedy which has been abolished. The modern proceeding is similar to a proceeding under article seventy-eight of the New York Civil Practice Act. It was designed to eliminate many of the complexities and technicalities which had been burdening courts, attorneys and taxpayers under the old procedure for many years and to establish a simple and efficient method of reviewing assessments.[39] The present remedy is exclusive only where review is not otherwise provided by law.[40] The proceeding is commenced by petition to the supreme court.[41] After answer by the respondent,[42] the court may determine from the pleadings that the assessment reviewed should be corrected on or stricken from the assessment roll.[43] If testimony is required to dispose of the matter properly, the court may take evidence or appoint a referee to take such evidence as it may direct.[44] Upon completion of the proceeding, if the evidence so warrants, the court by final order may correct or strike the assessment and direct refund of the taxes thus improperly collected.[45]

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[37] Redmond v. Mayor, *supra* note 31.

[38] Derived from former N.Y. TAX LAW article 13.

[39] N.Y. JUDICIAL COUNCIL, FOURTEENTH ANN. REP. 179–208 (1948).

[40] N.Y. REAL PROPERTY TAX LAW § 700.

[41] N.Y. REAL PROPERTY TAX LAW § 704.

[42] N.Y. REAL PROPERTY TAX LAW § 712.

[43] N.Y. REAL PROPERTY TAX LAW § 720–1.

[44] N.Y. REAL PROPERTY TAX LAW § 720–2.

[45] N.Y. REAL PROPERTY TAX LAW § 726.

A taxpayer asserting a right to refund of a tax erroneously or illegally collected may petition the board of supervisors of the county where the property is located to correct the assessment and refund the tax due, unless the error is one of judgment relating to the valuation of the property.[46] In the event of refusal, upon order of the county court the board may be required to refund the tax.[47] It has been said that a taxpayer may avail himself of this remedy provided he has paid taxes that he was not legally bound to pay to protect some interest in the property, and it is not material whether such taxes were paid voluntarily or under duress.[48]

In other than real property assessment cases, a taxpayer seeking to raise all possible questions relating to constitutionality, applicability, amount of the tax and correctness of the formula for arriving at it will ordinarily do so by the institution of a proceeding under article seventy-eight of the Civil Practice Act. Among the various taxes in which determinations of the taxing authorities have been judicially reviewed under article seventy-eight are the state income tax[49] and unincorporated business tax,[50] municipal sales taxes [51] and gross receipts taxes,[52] mortgage recording tax,[53] public utility tax [54] and franchise tax.[55]

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[46] N.Y. REAL PROPERTY TAX LAW § 556.

[47] *Ibid.* For certiorari proceedings to review a determination of the town board, see N.Y. TOWN LAW § 246, applied in New York Cent. R.R. v. Limburg, 261 App.Div. 562, 26 N.Y.S.2d 321 (1941).

[48] Conklin v. Bd. of Supervisors, 284 App.Div. 965, 134 N.Y.S.2d 735 (1954). See also Adams v. Bd. of Supervisors, 154 N.Y. 619, 49 N.E. 144 (1898), interpreting N.Y. COUNTY LAW § 16, predecessor of N.Y. TAX LAW § 56-a, predecessor in part of N.Y. REAL PROPERTY TAX LAW § 556. But *cf.* McCue v. Bd. of Supervisors, 162 N.Y. 235, 56 N.E. 627 (1900); Matter of Village of Delhi, 201 N.Y. 408, 94 N.E. 874 (1911); Matter of Morewood Realty Holding Co., 241 App.Div. 841, 271 N.Y.Supp. 392, *aff'd,* 265 N.Y. 520, 193 N.E. 301 (1934).

[49] N.Y. TAX LAW §§ 199, 375. See People *ex rel* Hull v. Graves, 289 N.Y. 173, 45 N.E.2d 161 (1942); People *ex rel* Maloney v. Graves, 289 N.Y. 178, 45 N.E.2d 164 (1942). These cases were brought under N.Y. TAX LAW §§ 199 and 375 in addition to N.Y. CIVIL PRACTICE ACT article 78.

[50] N.Y. TAX LAW §§ 199, 375, 386-j. See Matter of Teague, 261 App.Div. 652, 27 N.Y.S.2d 762, *aff'd,* 287 N.Y. 549, 38 N.E.2d 222 (1941); Thompson v. Mealey, 290 N.Y. 230, 48 N.E.2d 499 (1943).

A suit for a declaratory judgment is available where the constitutionality, legality or meaning of a statute is to be determined and no questions of fact are involved.[56] However, when questioning the amount of the tax or the correctness of the formula for arriving at it, the taxpayer is relegated to his proceeding to review and a declaratory judgment will not be granted.[57]

In real property tax situations, an action in equity is available to cancel a tax lien as a cloud on title when the assessment appears to be valid on its face but is in fact void due to a jurisdictional defect.[58] However, when the defect complained of is a mere irregularity, the taxpayer may obtain relief only by utilizing the statutory procedure specifically provided.[59] Thus, the mere fact that the assessment is for any reason invalid or illegal does not as a matter of right entitle the taxpayer to invoke the jurisdiction of a court of equity. The courts have justified this rule on the ground that without such limitation, collection of taxes and assessments would be subject to delay causing great embarrassment and inconvenience to the taxing authorities.[60] Where the statutory remedy is not exclusive, a property owner who is in possession may be able to wait many years before instituting an action to set aside a cloud on title.[61]

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[51] Good Humor Corp. v. McGoldrick, 289 N.Y. 452, 46 N.E.2d 881 (1943); Prudential Ins. Co. of America v. McGoldrick, 256 App.Div. 205, 9 N.Y.S.2d 515, *aff'd,* 281 N.Y. 595, 22 N.E.2d 166 (1939); Trustees of Sailors' Snug Harbor v. McGoldrick, 255 App.Div. 64, 5 N.Y.S.2d 322, *aff'd,* 280 N.Y. 537, 20 N.E.2d 7 (1939).

[52] New Yorker Magazine, Inc. v. Gerosa, 3 N.Y.2d 362, 144 N.E.2d 367, 165 N.Y.S.2d 469 (1957), *appeal dismissed,* 356 U.S. 339 (1958); Interborough News Co. v. McGoldrick, 283 N.Y. 49, 27 N.E.2d 428 (1940).

[53] N.Y. TAX LAW § 251. See Moon v. Jones, 282 N.Y. 553, 24 N.E.2d 981, *motion for reargument denied,* 282 N.Y. 622, 25 N.E.2d 396, *appeal dismissed,* 309 U.S. 640 (1940).

[54] N.Y. TAX LAW § 186–a. See Central Greyhound Lines, Inc. v. Mealey, 296 N.Y. 18, 68 N.E.2d 855, *rev'd,* 334 U.S. 653 (1948).

[55] N.Y. TAX LAW § 215. See People *ex rel* New York Trust Co. v. Graves, 265 App.Div. 94, 37 N.Y.S.2d 900, *aff'd,* 290 N.Y. 785, 50 N.E.2d 108, *motion for reargument and to amend remittitur denied,* 291 N.Y. 634, 50 N.E.2d 1018 (1943).

[56] Dun & Bradstreet, Inc. v. City of New York, 276 N.Y. 198, 11 N.E.2d 728 (1937).

[57] Berkshire Fine Spinning Associates, Inc. v. City of New York, 5 N.Y.2d 347, 157 N.E.2d 614, 184 N.Y.S.2d 623, *appeal dismissed,* 361 U.S. 3 (1959).

[58] Elmhurst Fire Co. v. City of New York, 213 N.Y. 87, 106 N.E. 920 (1914), where an action in equity to cancel certain real estate taxes was held to be maintainable although defendant claimed that a decision of its assessing officers in valuing plaintiff's property in excess of the exemption limit could be reviewed only by writ of certiorari. See also Van Voorhis v. County of Monroe, 288 N.Y. 138, 42 N.E.2d 6 (1942), where tax-

Even if it can be shown that an assessment is void because it is jurisdictionally defective, it may not be attacked collaterally where there has been provided a proper and exclusive means of reviewing the assessment.[62] The mere fact that a particular remedy purports to be exclusive is not always controlling. In a condemnation proceeding,[63] the question arose as to whether the property owner was exempt from the imposition of an assessment for a local sewer improvement. The assessment was held void and

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payer's property appeared on assessment rolls of a district in which it was not located; Autokefalos Orthodox Spiritual Church of St. George the Tropeopheros v. City of Mount Vernon, 285 App.Div. 1175, 141 N.Y.S.2d 21 (1955), where property was exempt from tax because used for religious purposes.

[59] Lewis v. City of Lockport, 276 N.Y. 336, 12 N.E.2d 431 (1938); Sikora Realty Corp. v. City of New York, 262 N.Y. 312, 186 N.E. 796, *motion for reargument denied,* 262 N.Y. 636, 188 N.E. 99 (1933).

[60] Strusburgh v. Mayor, 87 N.Y. 452, 455 (1882).

[61] "It is well settled that an owner in possession has a right to invoke the aid of a court of equity at any time while he is so the owner and in possession, to have an apparent, though in fact not a real incumbrance discharged from the record and such a right is never barred by the Statute of Limitations. It is a continuing right which exists as long as there is an occasion for its exercise." Ford v. Clendenin, 215 N.Y. 10, 16, 109 N.E. 124, 126 (1915).

[62] Lewis v. City of Lockport, *supra* note 59; Loomis v. City of Little Falls, 176 N.Y. 31, 68 N.E. 105 (1903).

[63] In the Matter of City of New York, 260 App.Div. 659, 23 N.Y.S.2d 561, *motion for reargument and leave to appeal denied,* 261 App.Div. 836, 25 N.Y.S.2d 1000 (1941).

thus not deductible from the condemnation award although it was contended that the Greater New York Charter purported to provide an exclusive remedy for vacation of an assessment.[64] The court took the position that although the remedy of the property owner would generally be found in the municipal charter, a collateral action may be maintained where the assessing officers were without jurisdiction. A scrutiny of the charter indicated that it did not provide a remedy where the assessment was void in its inception.

The common law action for money had and received is available when the relief sought is recovery of taxes illegally or erroneously collected, if legislation does not provide for an exclusive method for obtaining relief.[65] It has been held, however, that a local law purporting to provide an exclusive remedy for the recovery of taxes ''erroneously or illegally collected'' did not apply to a taxpayer as to whom the taxing statute was unconstitutional; therefore, his common law action for money had and received was not denied him.[66] In the ordinary case, unless the assessment has been vacated or reversed, the action appears limited to payments made under an assessment jurisdictionally defective.[67]

Effect of Section 112-f of the Civil Practice Act

An analysis of the body of law which long relied on the distinction between mistake of fact and mistake of law in restitution cases has pointed up the arbitrariness of the rule when applied both to tax and non-tax cases.[68] In order to enable the courts to grant restitution in some cases where payment, made under mistake of law, would not have been recoverable at common law, New York in 1942 enacted Civil Practice Act, section 112-f. That section provides: "When relief against mistake is sought in an action or proceeding or by way of defense or counterclaim, relief shall not be denied merely because the mistake is one of law rather than of fact." While this statute seems capable of a construction that would permit a departure from the voluntary-payment rule, it does not in all cases require a change, and in the only tax case construing the statute to reach the court of appeals since its enactment, its provisions were not given any significant effect. In *Mercury Mach. Importing Corp. v. City of New York*,[69] taxpayers engaged in interstate commerce attempted to recover a tax levied under the New York City General Business and Financial Tax Law, a local law which had been held unconstitutional when applied to interstate business. The court applied the voluntary-payment rule and denied recovery since the taxes were not paid under protest and there was no proof of duress or coercion. The appellate division had taken the position that under section 112-f a mistake of law is equivalent to a mistake of fact and payments made thereunder without protest are recoverable.[70] The court of appeals held this construction to be erroneous and stated that the statute does not purport to place mistakes of law in all respects upon a parity with mistakes of fact, adding, "It contains no reference to tax law. It removes technical objections in instances where recoveries can otherwise be justified by analogy with mistakes of fact." [71]

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[64] Greater New York Charter § 958 provided, "No suit or action in the nature of a bill of equity or otherwise shall be commenced for the vacation of any assessment in said city, or to remove a cloud upon title; but owners of property shall be confined to their remedies in such cases to the proceedings under this title."

[65] Title Guarantee & Trust Co. v. City of New York, 265 App.Div. 304, 38 N.Y.S.2d 715, *aff'd,* 290 N.Y. 910, 50 N.E.2d 301 (1943).

[66] New York Rapid Transit Corp. v. City of New York, 275 N.Y. 258, 9 N.E.2d 858 (1937).

[67] See Lewis v. City of Lockport, *supra* note 59.

[68] N.Y. Leg. Doc. (1942) No. 65 (B), N.Y. Law Revision Commission, 1942 Report, Recommendations and Studies 27–67.

In his dissent in the *Mercury* case, Judge Fuld disagrees strongly with the construction placed upon the statute by the majority and with the majority's reiteration of the basic reason for the rule; namely, that the absence of protest denies the municipality the opportunity to provide for possible repayment of the sums collected by segregating an appropriate amount to safeguard against the event. In view of the fact that recovery is permitted in cases involving mistake of fact, duress or coercion although made without protest, it appears that the principal if not the sole reason for retaining the voluntary-payment rule is to protect the jurisdiction imposing the tax from being faced with a large scale refund upon a judicial determination that the tax in question was levied illegally. Since the number of mistake-of-fact cases remains small and the mistake-of-law cases involving duress or coercion often involve peculiar circumstances, it is doubtful that the decisions permitting recovery in these cases have served to impose any unreasonable burdens on government finance. Whereas, if a productive taxing statute be declared unconstitutional and recovery be permitted, refunds could conceivably amount to millions of dollars. Such reasoning made small impression on Judge Fuld, who declared, ''It impresses me as the merest sophistry to suggest, as the city does, that, the greater the amount of money illegally collected, the stronger the reason for not returning it.''[72] Whether the reasoning of the majority in the *Mercury* case is satisfactory or not,[73] it appears that the New York courts will continue to abide by it, since the court of appeals has rejected an opportunity to determine otherwise. It will be interesting, however, to observe whether the court will utilize the permissive provisions of section 112-f where refund is claimed for payments voluntarily made without protest under an assessment invalid only as to the particular taxpayer where no elements of duress and coercion are present. If the statute is not to be applied in this latter instance, it is difficult to see how it will ever be of any benefit in tax refund cases.

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[69] 3 N.Y.2d 418, 144 N.E.2d 400, 165 N.Y.S.2d 517 (1957).

[70] Mercury Mach. Importing Corp. v. City of New York, 1 App.Div.2d 337, 149 N.Y.S.2d 900 (1956).

[71] Mercury Mach. Importing Corp. v. City of New York, *supra* note 69, at 427, 144 N.E.2d at 404, 165 N.Y.S.2d at 522.

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[72] *Id.* at 432, 144 N.E.2d at 407, 165 N.Y.S.2d at 526.

[73] See Sellin, *State and Local Taxation,* 33 N.Y.U. L. REV. 1120, 1129 (1958), criticizing the holding as a "narrow legalistic opinion" and indicating that public conscience and morality required that refunds be made.

Comments

Agency for Collection Under the Bank Collection Code: An Examination of Leonardi v. Chase National Bank

In 1929, the legislature of New York State enacted article 19-A of the New York Negotiable Instruments Law, entitled "Provisions for Bank Collections."[1] The purpose of the article is to expedite and simplify the collection and payment by banks of checks and other instruments for the payment of money. One of the significant provisions of article 19-A (hereafter referred to as the Bank Collection Code) is that, with certain exceptions,

> . . . [W]here an item is deposited or received for collection, the bank of deposit shall be agent of the depositor for its collection and each subsequent collecting bank shall be sub-agent of the depostitor. . . .[2]

Normally the relationship between a depositor and his bank is that of debtor and creditor,[3] the bank taking title to the proceeds of the deposit.[4] However, by virtue of the Bank Collection Code, whenever a check which must be presented to some other bank for payment is deposited "for collection" in the depositary bank, that bank and all subsequent banks through which the check passes in the course of collection are agents of the depositor.[5] For that reason, title to the check or its proceeds remains in the depositor while the agency continues.[6] Consequently, the depositor is entitled to revoke the authority of an agent bank at any time before the agency has terminated and recover the check itself or its proceeds.[7] It is generally held that the agency terminates when the check has been paid or collected.[8] Thereafter the depositary bank assumes the normal relation of debtor to the depositor.[9]

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[1] N.Y. Neg. Inst. Law art. 19-A, §§ 350–350-l.

[2] N.Y. Neg. Inst. Law § 350-a.

[3] Solicitor for the Affairs of His Majesty's Treasury v. Banker's Trust Co., 304 N.Y. 282, 107 N.E.2d 448 (1952); Sundial Constr. Co. v. Liberty Bank, 277 N.Y. 137, 13 N.E.2d 745 (1938); Gibraltar Realty Corp. v. Mount Vernon Trust Co., 276 N.Y. 353, 12 N.E.2d 438 (1938); *In re* Delaney, 256 N.Y. 315, 176 N.E. 407 (1931).

[4] Cases cited *supra* note 3.

[5] The same result is reached when a check is restrictively indorsed, pursuant to N.Y. Neg. Inst. Law § 66(2), so as to constitute the indorsee

This distinction becomes particularly important in the event of the depositary bank's failure during the collection process. If the depositary bank becomes insolvent before the agency has terminated (*i.e.*, before the check has been paid) the depositor may revoke the authority of the agent-banks and recover the check itself or its proceeds from whichever agent-bank is in possession thereof.[10] However, if the depositary fails after the check has been paid the depositor may not recover the check or its specific proceeds.[11] The agency having terminated, the depositor would be in the position of a mere creditor of the insolvent bank en-

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the agent of the indorser. However, by virtue of N.Y. NEG. INST. LAW § 350-a, an agency for collection is created whether the indorsement is restrictive or not. Also, section 350-c authorizes the depositary to insert suitable words so as to render the indorsement restrictive when the indorser has not done so. See the following cases, as to the effect of the agency: Henderson v. Lincoln Rochester Trust Co., 303 N.Y. 27, 100 N.E.2d 117 (1951); Carson v. Federal Reserve Bank, 254 N.Y. 218, 199 N.E. 777 (1930); Wolf v. Title Guar. and Trust Co., 251 App.Div. 354, 296 N.Y.Supp. 800 (1937), *aff'd*, 277 N.Y. 626, 14 N.E.2d 193 (1938); Matter of Bank of United States, 243 App.Div. 287, 277 N.Y.Supp. 96 (1935); Friedman v. Irving Trust Co., 164 Misc. 811, 300 N.Y.Supp. 51 (Munic. Ct. of New York 1937); *In re* Kountze Bros., 79 F.2d 98 (2d. Cir. 1935). UNIFORM COMMERCIAL CODE § 4–201, provides that "unless a contrary intent appears," the status of a collecting bank is that of an agent or sub-agent for the owner of the item.

[6] Wolf v. Title Guar. and Trust Co., *supra* note 5.

[7] *Ibid.*

[8] Matter of Bank of United States, *supra* note 5.

[9] *Ibid.*

[10] Wolf v. Title Guar. and Trust Co., *supra* note 5.

[11] Leonardi v. Chase Nat'l Bank, 263 App.Div. 552, 33 N.Y.S.2d 706 (1942).

titled only to share pro rata with other creditors in the available assets.[12] Thus the depositor in the former situation has a distinct advantage over the depositor who is a mere creditor, for having regained possession of his check, he may present it for payment to the solvent drawee. Indeed, he will be in a favored position even if he does not regain possession of the check itself, for he will be owner of any proceeds derived from the collection of his check.

It is important, therefore, to determine when a check in the process of collection has been paid in order to ascertain the rights of the depositor. This determination is complicated by the fact that payment between banks is usually not made in cash.[13] Normally, where an intermediate bank is involved, (*viz.*, a correspondent bank which receives the check from the depositary for the purpose of making presentment to the drawee on behalf of the depositary), it will provisionally credit the account of the depositary on its books when it receives the check, subject to the check's being honored by the drawee.[14] It then presents the check to the drawee, the drawee charges the account of the drawer and gives credit on its books to the account of the presenting bank in the amount of the check.[15] In such a situation, payment of the check occurs when an irrevocable credit [16] is given on the books of the drawee to the collecting bank.[17] When this is done the provisional credit given to the depositary by the intermediate bank also becomes final and irrevocable.[18]

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[12] N.Y. BANKING LAW § 625; N.Y. NEG. INST. LAW § 350–1.

[13] Dean Tobacco Warehouse Co. v. American Nat'l Bank, 173 Tenn. 365, 117 S.W.2d 746 (1938); see generally 9 C.J.S., *Banks and Banking* §§ 241–248 (1938).

[14] Leonardi v. Chase Nat'l Bank, *supra* note 11.

[15] *Ibid.*

[16] ". . . [T]he term 'unconditional credit' can only mean a credit which may not be withdrawn, even if it is eventually found that the item for which it is given is not collectible." Matter of Bank of United States, *supra* note 5, at 290, 277 N.Y.Supp. at 100. Such a credit does not include a draft of the drawee on another bank. *Ibid.*

[17] Leonardi v. Chase Nat'l Bank, *supra* note 11; see generally cases cited *supra* notes 5, 13 & 14; N.Y. NEG. INST. LAW §§ 350-a, 350-b, 350-i, 350-l.

This would appear to be a logical result, for if an irrevocable credit has been established in favor of the depositary bank, the provisional credit which it had originally given to the depositor, at the time of the deposit, can now be considered as final. He may draw against this credit, the proceeds of the check are fully available to him on demand, and, in a sense, he has been paid. If he chooses not to draw against the credit, but rather to maintain his account with the bank, it is not surprising that the law considers him to be in the same class as any other depositor of the bank, *i.e.,* a general creditor.[19] However, suppose that the depositary bank fails after an irrevocable credit has been established (and hence after a debtor-creditor relationship between the bank and the depositor has replaced the agency relationship), and that the failure has followed the technical payment so rapidly, in point of time, that it is impossible for the depositor to reach the depositary for the purpose of withdrawing the proceeds at a time when the depositary is still solvent. In such a case, is it fair to cast the depositor into the status of a creditor of an insolvent bank irrespective of the fact that he had no opportunity to enjoy the fruits of his deposit? Yet his check has been technically paid, and his attempt to recover against one of the other banks in the collection chain on the theory that he has revoked the agency will be met with the assertion that the agency had previously terminated when the check was paid.

In the case of *Leonardi v. Chase Nat'l Bank,*[20] the situation was essentially the same as that supposed but with the added hardship to the plaintiff-depositor that she was not allowed by the depositary bank to draw against her deposited check until eight days had elapsed from the date of deposit. The depositary there was a Florida bank, the drawee of the check was a New York trust company, and the defendant bank was a New York bank to which the check had been forwarded "for collection" by the Florida depositary. The plaintiff deposited her check in the Florida bank on June sixth. The defendant bank received the check from the depositary at 12:05 a.m. on June ninth. The check was presented to the drawee at sometime before 11:00 a.m. on June ninth, and the amount of the check was credited by the drawee to the account of the defendant. The Chase bank asserted that, pursuant to custom, the drawee was given an opportunity to dishonor the check by 3:00 p.m. of June ninth, and upon failure to do so, the credit in favor of the defendant became final and irrevocable as of that time.[21] The depositary failed after the close of business on June tenth. It was taken over by the Comptroller of the state of Florida on June eleventh and did not open its doors thereafter. At this time, the Florida bank owed the Chase bank over one million dollars for checks which it had collected for the Chase bank and credited to the account of the Chase bank. In like manner, the defendant owed the Florida bank $247,458.81, including the amount of plaintiff's check, in respect of items which it had collected for the Florida bank. The Chase bank, upon the depositary's failure, set off on its books the amount owing to the Florida bank against the amount owing from the Florida bank to itself. The plaintiff sued the Chase bank for conversion on the theory that by so setting off the indebtedness it had converted the proceeds of her check. Plaintiff predicated her claim upon a Florida statute which constituted the Chase bank a sub-agent of plaintiff for collection of the proceeds of the check.[22] The plaintiff's right to recover, in turn, depended upon whether ''actual final payment'' had been made so as to render plaintiff the mere creditor of the depositary.

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[18] Leonardi v. Chase Nat'l Bank, *supra* note 11.

[19] Carson v. Federal Reserve Bank, *supra* note 5.

[20] 263 App.Div. 552, 33 N.Y.S.2d 706 (1942).

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[21] In this regard, see the New York deferred posting statute, N.Y. NEG. INST. LAW § 350-b.

[22] COMPILED GENERAL LAWS OF FLORIDA § 6834 is to the effect that when a check is deposited in a bank for credit or collection, it shall be considered due diligence on the part of the bank in the collection thereof to forward it without delay according to the regular course of business of banks, and such forwarding bank shall only be liable, except in case of want of due diligence, "after actual final payment is received by it."

The appellate division held in favor of the Chase bank. The deposit slip used by plaintiff in depositing the check with the Florida bank stated, ''All items are credited subject to final payment in cash or solvent credits.''[23] The court considered the implication of this provision to be that a credit provisionally given upon deposit becomes final when the item is collected and final payment by a solvent credit is received by the bank.

> The undisputed proof is that final credit was given the bank by defendant as of the close of the business day of June ninth, in accordance with custom and the understanding of the banks. . . . Credit is the exclusive means of payment in ordinary banking practice. 'The cash is not handled' and 'No money passes.' Here, the payment to the bank was by means of a final solvent credit, as the result of which the agency terminated and the relationship of debtor and creditor ensued between defendant and the [Florida] bank.[24]

Since the relationship between the defendant and the Florida bank was that of debtor and creditor in respect of mutual accounts, the defendant was allowed to set off the credits attributable, in part, to the plaintiff's check, against the amount owing from the Florida bank.

The court deemed it immaterial that the plaintiff was not permitted to draw against her deposited check for eight days, and that the insolvency had occurred before the lapse of the eight days, thus making it impossible for plaintiff effectively to demand payment from the Florida bank at a time when it was solvent.[25] No benefit had resulted to the plaintiff, and yet she was bound by what amounted to book entries. In addition, the court thought it insignificant that the plaintiff had restrictively indorsed her check "for collection" since the operation of the Florida statute achieved the same effect as a restrictive indorsement.[26]

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[23] Leonardi v. Chase Nat'l Bank, *supra* note 20, at 555, 33 N.Y.S.2d at 710.

[24] *Ibid.*

[25] Leonardi v. Chase Nat'l Bank, *supra* note 20, at 556, 33 N.Y.S.2d at 711.

The *Leonardi* case dealt with the construction of a Florida statute and made no mention of the New York Bank Collection Code. Whether the result would have been different had article 19-A been involved is not entirely clear. However, the effect of the Florida statute in creating an agency for collection is the same as that of the Bank Collection Code.[27] Also, the Bank Collection Code appears to be definite in providing that payment of a check occurs when an irrevocable credit is established.[28] On this basis, it is probable that the rule under article 19-A would not be different from the holding in *Leonardi*. In section 350-l of the Bank Collection Code,[29] provisions are set forth for preferences among creditors and depositors in the event of a bank's failure. These are as follows: (1) when the drawee or any other agent or collecting bank fails after an item has been entrusted to it for collection or payment, such item must be returned to the forwarding or presenting bank; (2) if an item is presented to the drawee bank at a time when it has on deposit to the credit of the maker or drawer an amount equal to such item, and the drawee fails after having charged the item to the account of the maker or drawer, but before such item has been paid or settled for by the drawee either in money or by an unconditional credit given upon its books, the assets of the drawee are to be impressed with a trust in favor of the owner of the item who shall be entitled to a preferred claim against the drawee; (3) where an agent collecting bank other than the drawee fails after receiving the proceeds of an item, but before such item has been paid by it either in money or by an unconditional credit given on its books, the assets of the failed bank are to be impressed with a trust in favor of the owner of the items for the amount of the proceeds. Under these provisions the rights of the depositor seem, also, to depend upon whether the check has been paid, and no provision is made for relief to the depositor in the hardship case presented by *Leonardi.* Assuming, therefore, that the *Leonardi* rule would prevail under the Bank Collection Code, would it be desirable for the courts so to construe the New York statute as to afford a measure of relief to a depositor who finds himself in the situation presented by *Leonardi?*

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[26] *Ibid.*

[27] N.Y. NEG. INST. LAW §§ 350-a and 350-c.

[28] N.Y. NEG. INST. LAW §§ 350-a, 350-h, 350-i, 350-l.

[29] N.Y. NEG. INST. LAW § 350-l. UNIFORM COMMERCIAL CODE § 4–214 provides for preferences in the event of insolvency. The rules are similar to those stated in the Bank Collection Code, but with the abandonment of any theory of trust, UNIFORM COMMERCIAL CODE § 4–214, comment 2 (1958). The purpose of the section is not to confer preferences, but to fix as definitely as possible ". . . the cut-off point of time for the completion or cessation of the collection process. . . ." UNIFORM COMMERCIAL CODE § 4–214, comment 1 (1958).

Unfortunately, few cases have arisen under the Bank Collection Code, and the writer has found no case reported since *Leonardi* which is precisely in point with the problem under consideration. What cases there are, while distinguishable from *Leonardi,* seem also to recognize a distinction based upon whether the agency relationship has been replaced by a debtor and creditor relationship as a result of payment.

In *Matter of Bank of United States,*[30] the claimant, desiring to close his account with the Bank of the United States, drew a check for the entire amount thereof payable to the National City Bank. The National City Bank presented the check to the Bank of the United States and received that bank's cashier's check in payment. The cashier's check was then presented for payment to the Bank of the United States by the National City Bank. After the Bank of the United States received its cashier's check for payment, but before it was paid, it failed. The cashier's check was returned to the National City Bank, which it thereafter indorsed and delivered to the claimant. The court held that the claimant, as holder of the cashier's check, was not entitled to a preferred claim against the Bank of the United States by reason of his assertion that it represented the proceeds of the check he initially drew against his account. The cashier's check was given in payment of the check claimant drew payable to the National City Bank, and, since it was the equivalent of an irrevocable credit (it being the primary obligation of the Bank of the United States), the Bank of the United States was only the debtor of the holder of that check. When the claimant took an assignment of the cashier's check, he received only the rights of a creditor of the Bank of the United States.

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[30] 243 App.Div. 354, 277 N.Y.Supp. 96 (1935).

Matter of Bank of United States can be distinguished from the *Leonardi* case on the ground that the drawee failed rather than the depositary. The court in *Leonardi* noted that if the drawee or the intermediary had failed rather than the depositary, after payment, the loss would have fallen on the depositary rather than the depositor, for the payment would have rendered the depositary the debtor of the depositor.[31] The failure of the intermediary or the drawee would have no effect on the fact that an irrevocable credit had been established in favor of the depositary, thus ending the agency. On this basis, it would seem that the claimant had a right to draw against his deposit in the National City Bank after that bank received the cashier's check as the equivalent of an irrevocable credit, and would, therefore have been wiser to retain his status as a depositor of the National City Bank by refusing to accept an assignment of the cashier's check.

In *Wolf v. Title Guar. and Trust Co.,*[32] the plaintiff deposited the defendant's cashier's check, payable to plaintiff's assignor, in the depositary bank. Upon learning of the depositary bank's failure, and before the check had been presented to the defendant for payment, the depositor notified defendant of the bank's failure, that its authority as agent was revoked, and directed defendant to refuse payment of the check, which instructions defendant ignored. It was held that until payment of the check by defendant, title to the check was in the depositor, whether the depositary or some other bank had possession of it, and that the depositor, by notice to the defendant, could revoke the authority of any agent bank to collect the check. The defendant disregarded the depositor's instructions at its own risk and was, therefore, held liable to the depositor in conversion. The case, however, indicated that title in the check remained in the depositor only because it had not yet been paid.

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[31] Leonardi v. Chase Nat'l Bank, *supra* note 20, at 556, 33 N.Y.S.2d at 711.

[32] 251 App. Div. 354, 296 N.Y.Supp. 800 (1937), *aff'd,* 277 N.Y. 626, 14 N.E.2d 193 (1938).

The case of *Friedman v. Irving Trust Co.*,[33] involved a situation more nearly like that in *Leonardi*. No notice of termination of the authority of the agent banks was given by the depositor to the defendant bank, a collecting bank, but judgment was in favor of the depositor on the ground that the defendant knew of the depositary's failure before it had credited the account of the depositary. The court recognized that while the defendant claimed that it had paid the depositary in good faith, ". . . the actual fact is that the so-called 'payment' was nothing more than a mere accounting item on its books after the suspension of the depositing bank."[34] The proceeds were not only not collected, but the checks themselves were not even received until after the depositary had failed. The agency was revoked by operation of law when the Superintendent of Banks took possession of the depositary.

The plaintiff in *Carson v. Federal Reserve Bank*[35] was allowed to recover in full from the depositary which had failed, the proceeds of a draft which he had deposited for collection. The bank had received the actual proceeds of the draft, and thus the draft would have been considered paid under the general rules. However, by reason of the fact that the depositor had included with the draft when he deposited it a note to the effect that the draft was not to be treated as a deposit but the funds collected were to be delivered to the plaintiff and not commingled with other funds of the bank, the plaintiff had never become a creditor of the depositary. The contract between the parties called for actual delivery of the proceeds, the bank did not acquire title to the proceeds when the draft was paid by the drawee, and the bank could not acquire title thereafter by commingling the proceeds with its own funds.

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[33] 164 Misc. 811, 300 N.Y.Supp. 51 (Munic. Ct. of New York 1937).

[34] *Id.* at 813, 300 N.Y.Supp. at 54.

[35] 254 N.Y. 218, 199 N.E. 777 (1930).

The essential fact in the *Carson* case was the agreement between the parties. On the strength of this decision and the provision of the Bank Collection Code, that the parties may vary the statutory relationship by agreement,[36] a depositor may protect himself by a proper indorsement of his check to the depositary. A mere indorsement ''for collection'' is not sufficient to protect the depositor for it accomplishes no more than the statute itself.[37] However, does not the fact that the depositor has indorsed ''for collection'' at least indicate that it is his intention that payment of the check is to inure to his actual benefit, and that until payment actually is made available to him the agreement is not fulfilled? If the average depositor were aware of the fact that an indorsement ''for collection'' was not sufficient, is it not likely that he would add more to his indorsement as the plaintiff in the *Carson* case did? While the opinion in *Leonardi* deemed it immaterial that the plaintiff had indorsed her check ''for collection,''[38] yet, it would seem that, as an expression of the depositor's intended purpose in making the deposit, it is relevant to show what the nature of the agency was to be.[39] Unless it can truly be said that the bank is unaware that the depositor of a check indorsed "for collection" contemplates that funds are to be actually made available to him, rather than merely made available to him in a technical sense, the moment the depositary receives an irrevocable credit, it would seem that the intended purpose of the principal would be controlling on the agent banks.[40] On this basis why should the agent banks be relieved of liability for the check prior to such time as the purpose of the agency has been accomplished by placing at the principal's disposal the funds which he has expected?

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[36] N.Y. NEG. INST. LAW § 350-a.

[37] Leonardi v. Chase Nat'l Bank, *supra* note 20, at 556, 33 N.Y.S.2d at 711.

[38] *Ibid.*

[39] See Dean Tobacco Warehouse Co. v. American Nat'l Bank, 173

While cases construing the Bank Collection Code indicate no basis upon which the courts might afford relief to a depositor in the *Leonardi* situation, arguments and analogies outside of the Bank Collection Code would seem to provide ample grounds for modifying the *Leonardi* rule. A number of New York cases, for example, have dealt with the question of whether the giving of credit on the books of the collecting bank in favor of the depositary bank, without notice of the rights of the depositor, constitutes the giving of "value" so as to make the bank a holder in due course of the instrument in question. The cases are uniform in holding that the giving of such credit is not sufficient to defeat the rights of the depositor.[41] It is not until the credit has been availed of by a withdrawal that the crediting bank is held to have given value.[42] The theory of these cases is that while the extending of credit is good consideration in contract law it is not present value

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Tenn. 365, 367, 117 S.W.2d 746, 748, to the effect that the relationship between the depositor and the banks and the scope of the agency are determined by the intention of the parties. See also *In re* Kountze Bros., 79 F.2d 98 (2d. Cir. 1935).

[40] Carson v. Federal Reserve Bank, *supra* note 35.

[41] Citizens' State Bank v. Cowles, 180 N.Y. 346, 73 N.E. 33 (1904); McBride v. Farmers' Bank, 26 N.Y. 450 (1863); see generally ANNOT. 118 A.L.R. 373 (1939), to the effect that mere crediting of forwarding bank does not defeat the rights of the true owner.

[42] Citizens' State Bank v. Cowles, *supra* note 41.

under the Negotiable Instruments Law.[43] By merely establishing a credit upon its books, the bank has not actually parted with anything.[44]

The concept of ''holder in due course'' is entirely separate from that of ''payment'' of an instrument.[45] Yet, while a credit may constitute valid payment, the paying bank has obviously parted with no more when it pays a check by means of a book entry than when it attempts to become a holder in due course by the same process. On this basis, where the depositor stands to suffer an unfair loss, why not view the book entry for what it actually is,[46] treat it as a nullity, and allow the depositor to recover from either the intermediate collecting bank or the drawee? Furthermore, if the result in *Leonardi* had been different, what loss would the Chase bank have suffered by reason of the depositor's recovery? If the Chase bank had received cash in payment from the drawee, and had not yet turned this cash over to the depositary, clearly it could assert no title to this money for it holds it only as agent. If the depositor is allowed to recover this money, the Chase bank would not suffer for it is left in the same position it would have been had the collection never occurred. If, on the other hand, it has transmitted the money to the depositary the situation would be unlike that in *Leonardi*, for it has actually parted with the specific cash contemplated in the transaction, the agency will have terminated, and again, it is left in the same position that it would have occupied had it never come in contact with the plaintiff's check. In either situation, where cash has been handled, the Chase bank would gain no benefit of set off against the depositary, for, in effect, it has acted as a mere conduit of the proceeds of the check,[47] and no change has occurred in the mutual accounts existing between the two banks by reason of the collection. On the insolvency of the depositary, therefore, the Chase bank's claim against the insolvent, which had arisen from a course of dealing prior to the collection of the plaintiff's check would not be reduced, by reason of set-off, by the amount of the plaintiff's check.

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[43] Citizens' State Bank v. Cowles, *supra* note 41.

[44] Citizens' State Bank v. Cowles, *supra* note 41.

[45] See Nat'l Commercial Bank and Trust Co. v. Madison, 270 App.Div. 437, 60 N.Y.S.2d 832 (1946).

[46] ". . . [T]he actual fact is that the so-called 'payment' was nothing more than a mere accounting item on its books. . . ." Friedman v. Irving Trust Co., 164 Misc. 811, 813, 300 N.Y.Supp. 51, 54 (Munic. Ct. of New York 1937).

This should be compared to the result flowing from the *Leonardi* case. If payment is by means of an irrevocable credit, the collecting bank is allowed to assert that it has paid the depositary just as if cash had passed even though it has parted with nothing tangible. In addition, the collecting bank is allowed a set off against the depositary to the extent of the depositor's check. The effect is that the collecting bank has received a double benefit from having dealt with the depositor's check, for it has off-set the amount of the check against its account with the depositary and it has also received an irrevocable credit, or conceivably cash, from the drawee which it may now use as it wishes. Thus, it was to the collecting bank's advantage to deal in credit rather than cash, for by dealing in credit it has received payment in full of so much of its unsecured claim against the depositary as represents the plaintiff's check. Had it dealt in cash, it would have had the very same claim against the depositary, but because its set-off would not have been augmented by an amount representing the plaintiff's check a greater proportion of its claim against the depositary would not be satisfied in full, unless the depositary eventually paid one hundred percent on the dollar to its general creditors. The result is that the party which has benefited from the collection of the depositor's check is the intermediate bank, a result which seems anomalous in view of the fact that the depositor had set the collection process in motion only for his own benefit.

The practice of utilizing book entries as a means of payment apparently was adopted by bankers as a convenience to themselves.[48] When credits are used there is no necessity for handling cash. Rather than transferring cash each time a check is collected, the accounts arising from the collection of numerous checks may be settled in a single transaction by balancing the accounts at regular intervals. If risks are inherent in the nature of such a system, is it not reasonable that the banks which have adopted such a means of payment should bear those risks rather than the many depositors who have practically no choice but to accept banking practices as they now exist? Of course it can be said that a depositor, in dealing with banks, becomes bound by such trade usages as are thus employed. However, it is ordinarily required that a person know or have reason to know of the usage and its nature.[49] While lack of knowledge is immaterial if the usage is so notorious that a person ought reasonably to have known of it,[50] yet it may seriously be questioned whether the ordinary prudent depositor ought to be held accountable for knowledge of the consequences of a usage in so complicated a field as banking. On this basis it seems unreasonable that a bank, by reason of a set-off, should enjoy the full benefit of the depositor's check, when the depositor, for whose benefit the transaction was initiated, receives no benefit whatsoever.

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[47] N.Y. NEG. INST. LAW §§ 350-h and 350-i.

The case of *Dean Tobacco Warehouse Co. v. American Nat'l Bank*[51] was cited in the *Leonardi* case as being directly in point with the court's decision.[52] In the *Dean* case it was held, under similar factual circumstances as in

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[48] See generally ANNOT., 118 A.L.R. 363 (1939), "Arrangement or course of dealing between forwarding bank and collecting bank as affecting relations or rights as between depositor of collection item and the collecting bank." Nothing in N.Y. NEG. INST. LAW art. 19-A requires banks to deal only in credit when collecting items.

[49] Custom or usage among banks must be known to the depositor or be so general and common as to raise the presumption that he had it in mind at the time of the deposit, Walls v. Bailey, 49 N.Y. 464 (1872); Albert v. State Bank, 78 Misc. 56, 138 N.Y.Supp. 237 (Sup. Ct. 1912).

[50] *Ibid.*

[51] 173 Tenn. 365, 117 S.W.2d 746 (1938).

[52] Leonardi v. Chase Nat'l Bank, *supra* note 20, at 556, 33 N.Y.S.2d at 711.

Leonardi, that when the drawee bank credited the account of the depositary bank, the obligation of the depositary bank to the depositor became absolute. There was no indication in the *Dean* case whether the depositor was allowed to draw immediately against the check upon its being deposited. However, the deposit slip contained a provision similar to that in the *Leonardi* case, ''In receiving items for deposit and collection, this bank acts only as depositor's collecting agent . . . all items are credited subject to final payment in cash or solvent credits.''[53]

The opinion in the *Dean* case stated that the intention of the parties to the transaction, as evidenced by their contract and the surrounding circumstances, is controlling on the determination of whether the collecting bank, after collection, stands in the relation of debtor or agent to the owner of the paper or the depositary bank, and also on the consequent determination of the ownership of the proceeds.[54] If the deposit slip in both *Leonardi* and *Dean* can be said to embrace the agreement between the parties, it would seem that insofar as the depositor is concerned the agreement has not been fulfilled. The agency is to continue until payment is received in cash or solvent credits. But the depositary, being insolvent, is incapable of extending a solvent credit to the depositor. Thus, by the terms of the agreement, the depositor's account has not been paid. This would appear to be particularly true in the *Leonardi* case where the depositor could not draw against her deposit for eight days. Such a provision of the agreement could well be construed to imply that regardless of when an irrevocable credit was established in favor of the depositary, payment to the depositor herself is not effected until the right to draw against her account is complete.

However, the courts in *Leonardi* and *Dean* were of the opinion, apparently, that the effect of the deposit slip was to render the entire transaction closed when an irrevocable credit was established in favor of the depositary bank.[55] Admittedly, the depositary bank in either case had received a solvent credit from the collecting bank. Nonetheless, it would seem that the very fact that the depositor is rendered a creditor of the bank indicates that a contract had existed between the depositor and the bank in relation to the deposit.[56] It is submitted that in respect of the depositor the contemplated consideration was that solvent credits should be made available to *him* on the eighth day after the deposit was made. If this analysis is sound, then it would follow that since the depositor has not received the right to draw against the proceeds of his check there has been a failure of consideration. This would seem to negate an assertion that the contract has been executed by payment so as to render the depositor a creditor. The depositary bank should also be bound by the force of the condition which it has imposed that withdrawals are not to be made for eight days. And since this requirement lies at the very foundation of the transaction, constituting a part of the surrounding circumstances and agreement between the parties, why should it not be said of the other agent banks that they are also bound by the condition and, insofar as the depositor is concerned, any irrevocable credit given to the depositary is, nonetheless, revocable by the depositor before the eight days have elapsed? It is often stated that a contract is to be construed most strongly against the party who has drafted it.[57] Since the depositor has no hand in drafting the deposit slips, and since he is probably untutored in banking practices and consequently unable to protect himself in the transaction as fully as the bank protects itself, perhaps that interpretation should be placed upon the wording of the deposit slip and the entire transaction which would protect the depositor.[58]

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[53] Dean Tobacco Warehouse Co. v. American Nat'l Bank, *supra* note 51, at 366, 117 S.W.2d at 747.

[54] *Id.* at 367, 117 S.W.2d at 748.

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[55] Leonardi v. Chase Nat'l Bank, *supra* note 20, at 555, 33 N.Y.S.2d at 710. Dean Tobacco Warehouse Co. v. American Nat'l Bank, *supra* note 51, at 367, 117 S.W.2d at 748.

[56] The relationship between a bank and its depositor is that of debtor and creditor and is contractural. Hartford v. Bank of New York, 261 App.Div. 278, 24 N.Y.S.2d 783 (1941), *aff'd,* 286 N.Y. 576, 35 N.E.2d 926 (1941).

[57] Taylor v. U. S. Casualty Co., 269 N.Y. 360, 199 N.E. 620 (1936).

That the *Leonardi* case inflicts a hardship on the depositor is apparent. Although mere hardship to the depositor is no ground for deserting the rule there laid down, if a rational basis exists upon which to predicate a different rule more favorable to the depositor and fair to all parties concerned, then, in the absence of a compelling reason to the contrary, why should the *Leonardi* rule not be modified?[59] The conclusion from the foregoing discussion is that sufficient reasons do exist for granting relief to a depositor who finds himself in the *Leonardi* situation. Such relief might take the form of a right of action against the collecting bank, which might then recover over from the drawee on the credit which the drawee had previously given it. Perhaps a more equitable solution would be to treat the entire collection process as a nullity, place the parties in their original positions by wiping out the book entries, and thus preserve the depositor's right, after he had recovered the check, to seek payment from the drawee or the secondary parties in case of the drawee's default. The latter proposal would avoid a conceivable situation where the irrevocable credit given by the drawee to the intermediary becomes unavailable to the intermediary, after the depositor has recovered from it, by reason of the drawee bank's also becoming insolvent. Both suggested remedies would secure the benefit of the check to the party for whom it was intended rather than to a bank which has not even given value for it within the meaning of the Negotiable Instruments Law. In any event, however, it should be clear that no such remedy should be accorded to a depositor who has had full opportunity to withdraw the proceeds of his check prior to the depositary's failure. As to him it can truly be said that he had exercised a free choice in not withdrawing his funds while he had the right to do so.

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[58] *Ibid.* It would seem that decisions declaring the banking business to be affected with public interest and subject to legislative control in the interests of the public would also be pertinent here. See, *e.g.,* Rothschild v. Manufacturers Trust Co., 279 N.Y. 355, 18 N.E.2d 527 (1939), and Leary v. Capitol Trust Co., 238 App.Div. 661, 263 N.Y.Supp. 640 (1933).

[59] Since UNIFORM COMMERCIAL CODE § 4–214, providing for preferences in the event of insolvency, seems to continue the distinction of whether the check has been paid or not, it is likely that the Uniform Commercial Code would not alter the holding in the *Leonardi* case that the depositor may not proceed against the intermediary bank after payment has become final. However, section 4–214(4) of the Code provides: "If a collecting bank receives from subsequent parties settlement for an item which settlement is or becomes final and suspends payments without making a settlement for the item with its customer which is or becomes final, the owner of the item has a preferred claim against such collecting bank." If it can be said that the depositary's settlement with its customer is not final until the time limit during which the customer is not permitted to draw against his account has expired, then it is probable that the depositor would be entitled to a preferred claim against the depositary bank. Perhaps this would also be the effect of N.Y. NEG. INST. LAW § 350–1(3). Even if this were true, such a preference would not mitigate the loss to the depositor in a situation where the depositary's funds were insufficient to satisfy preferred claims.

ARNOLD R. PETRALIA

Effect of a Lessee's Failure or Delay in Giving Notice of an Intention to Renew a Lease

Introduction

What is the effect of a lessee's failure or delay in giving notice of his intention to exercise a renewal option given in a lease? This question continues to face the New York courts. Customarily the giving of notice is a condition precedent to the renewal of the lease, but certain factors may exist which will enable a court of equity to give the tenant relief despite the fact that there has not been a strict compliance with the lease. The purpose of this comment is to state the general rule regarding the effect of failure by a tenant having a renewal option to give timely notice of exercise of the option; then to determine by case analysis when and why that general rule will be modified by equitable considerations so as to relieve the tenant from the normal consequences of failure to give timely notice.

The question is most frequently encountered where a tenant has made substantial capital improvements in the leasehold or has built up a valuable business. From a practical point of view, it is difficult for the tenant to understand why he should be made to give up his business, which may be his sole means of support, when his oversight in compliance with the terms of the lease was very slight.

General Rules

A lease is a contract between a landlord and tenant[1] that conveys an estate in land for a definite period of time.[2] A common covenant of a commercial lease provides for an option to renew the lease upon the expiration of the original term. This covenant to renew for another term implies an agreement that the original lease will be extended upon the same terms and conditions,[3] providing the tenant exercises this option to renew in the time and manner specified.[4]

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[1] Gaulang Realty Co. v. Dyee, 207 Misc. 480, 138 N.Y.S.2d 817 (Mun. Ct. of City of N.Y. 1954).

[2] 2 BOUVIER'S LAW DICTIONARY 1887 (8th ed. 1914). See also 24 WORDS AND PHRASES 461 (perm. ed. 1940).

If the tenant fails to renew the lease in the time and manner specified, the term expires by its own limitation, the lease becomes inoperative, and the lessor is entitled to the possession of the premises.[5] This is based upon the principle that time is of the essence,[6] and the giving of notice, in the absence of waiver, is a condition precedent to the right to renew the lease.[7] Time is generally considered of the essence in all option contracts,[8] although the parties did not expressly state this, and it is the rule in equity as well as at law.[9]

However, special circumstances may exist which will provide a basis by which the court may grant relief against the consequences of the lessee's failure to notify the lessor within the stipulated time of his intention to renew the lease.[10] It is difficult to lay down a definite rule as to when equitable relief will be granted for the matter is one largely in the discretion of the courts who weigh the facts of each particular case. In general, it may be said that courts of equity have granted relief in cases of special hardship,[11] or of a failure to give notice within the required time because of some unavoidable accident or circumstance,[12] where the delay has not been wilful or the result of gross negligence,[13] and the landlord has not been prejudiced or damaged thereby,[14] if justice will be promoted by granting a renewal of the lease rather than by giving effect to the consequences of the tenant's failure to give notice of renewal within the time and manner specified.[15] Equity may also give relief against the consequences of a failure to give notice, where such failure results from fraud by the lessor, inadvertent mistake by the lessee,[16] surprise as to certain conditions of the lease,[17] or ignorance by the lessee of material facts.[18] But relief will not be granted where there has been gross neglect on the part of the lessee not accompanied by any fault on the part of the lessor.[19] There must be present some considerations of justice or morality upon which a court may base its decision in departing from the general rule.

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[3] Berry v. Stuyvesant, 245 App. Div. 516, 283 N.Y.Supp. 191 (1935).

[4] Peoples Bank v. Mitchell, 73 N.Y. 406 (1878); 3 THOMPSON, REAL PROPERTY § 1122 (1959).

[5] Goldberg v. Himlyn, 121 Misc. 580, 201 N.Y.Supp. 837 (Kings County Ct. 1923). The court held, where the lease requires all the tenants to join in the giving of notice, notice is ineffective unless all the tenants so join. When a deceased tenant dies the right or option to renew a lease becomes personal property (N.Y. DEC. EST. LAW § 80; N.Y. SURR. CT. ACT § 202) and is distributable as part of the estate of the deceased. The executors and administrators of the estate must give this notice.

[6] Goldberg v. Himlyn, *supra* notes.

[7] Doepfner v. Bowers, 55 Misc. 561, 106 N.Y.Supp. 932 (Sup. Ct. 1907); Fidelity & Columbia Trust Co. v. Levin, 128 Misc. 838, 221 N.Y. Supp. 269 (Sup. Ct. 1927), *aff'd,* 221 App. Div. 786, 223 N.Y.Supp. 866 (1927), *aff'd,* 248 N.Y. 551, 162 N.Y. 521 (1928).

[8] Discussed in CORBIN, OPTION CONTRACTS, 23 YALE L.J. 641, 662 (1914).

[9] "In a contract of option the party giving the option protects himself only by a condition. There is no obligation on the other side to perform. . . . Therefore, 'whether the question arises either at law or in equity it is settled that "time is of the essence of an option."'" See 3 WILLISTON, CONTRACTS 2389–90 (rev. ed. 1936). See also Kerr v. Purdy, 51 N.Y. 629 (1872).

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[10] See 3 THOMPSON, NEW YORK LAW OF LANDLORD & TENANT § 1025 (1937).

[11] Fountain v. Stein, 97 Conn. 619, 118 Atl. 47 (1922). The court stated that they would accept all evidence which would show the equity of the hardship. Annot., 27 A.L.R. 976 (1923); 44 A.L.R. 2d 1361 (1955).

[12] Central Hanover Bank & Trust Co. v. Rabinowitz, 157 Misc. 654, 284 N.Y.Supp. 526 (Sup. Ct. 1935).

[13] Reed v. St. John, 2 Daly 213 (N.Y. 1867).

[14] Jones v. Gianferante, 305 N.Y. 135, 111 N.E.2d 419 (1953).

[15] New York Life Ins. & Trust Co. v. St. George's Church, 64 How. Pr. 511 (N.Y. 1883).

[16] Ringelheim v. Karsch, 112 N.Y.S.2d 130 (Sup. Ct. 1952).

[17] 2 POMEROY, EQUITY JURISPRUDENCE § 451 (5th ed. 1941).

[18] New York Life Ins. & Trust Co. v. St. George's Church, 64 How. Pr. 511 (N.Y. 1883).

[19] Fidelity & Columbia Trust Co. v. Levin, *supra* note 7.

The difficulty in applying equitable relief where there has been a failure to give notice, as stated previously, is that the notice is a condition precedent.[20] The rule in New York is that if notice has not been given equity can give no relief because until notice has been given no estate has vested in which equity can prevent a forfeiture.[21] The foundation of this rule is that a man should be able to lease his premises for a duration which he chooses and as to any lawful conditions which he desires to impose. Any other rule would deprive an owner of his property, a deprivation which cannot be compensated for pecuniarily. This rule, however, has not been strictly followed,[22] and the cases which have been decided contrary to the rule are not reconcilable with it.

Applications

a. Slight delay

The rule that equity will grant relief where the delay was slight and the lessor was not injured by the failure to give notice on time finds support in *Reed v. St. John*.[23] In that case, the lessee placed his renewal notice in the mail on the last day given by the lease for a six-months notice of an intention to renew the lease. The lessor made no objection to the time or sufficiency of the notice. Over a month later the lessor notified the lessee that he would not accept the notice of renewal. The court held that, since the notice was only a day late, the case was one for equitable relief. There must, however, in addition to slight delay, be a finding that the delay has not prejudiced the landlord.

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[20] Doepfner v. Bowers, 55 Misc. 561, 106 N.Y. Supp. 932 (Sup. Ct. 1907).

[21] *Id.* at 565, 106 N.Y.Supp. at 934. See Precht v. Howard, 187 N.Y. 136, 79 N.E. 847 (1907).

[22] Jones v. Gianferante, 305 N.Y. 135, 111 N.E.2d 419 (1953); Ringelheim v. Karsch, 112 N.Y.S.2d 130 (Sup. Ct. 1952); New York Life Ins. & Trust Co. v. St. George's Church, 64 How. Pr. 511 (N.Y. 1883).

[23] Reed v. St. John, 2 Daly 213 (N.Y. 1867).

What amounts to a slight delay is a matter of judicial interpretation. No rule can be set down; each case must depend upon its own peculiar facts. In *Fidelity & Columbia Trust Co. v. Levin,*[24] the lessee lost his right of renewal where he failed to give notice until more than one month after the date fixed. The court determined that this was a gross neglect of the terms of the lease and denied equitable relief, stating:

> The defendant Levin is not seeking to prevent the forfeiture of an existing right because of a mistake or omission. . . . But he asks a court of equity to make a new contract; to perform a condition precedent that he never performed; . . . to create an estate which even now cannot be created by the plaintiffs.[25]

b. Accident, mistake, or unexpected circumstances

Equity will grant relief to a lessee who has failed to give notice of renewal within the prescribed time, where such failure was due to accident, mistake, or other circumstances, and the landlord was not prejudiced thereby.[26] In *Application of Topp,*[27] the tenant failed to give notice on the law day required. He argued that this failure was due to the fact that the indenture of lease was in the possession of his attorney, and, since his delay was slight and he had a large investment in the premises, it would be inequitable to charge him with his failure to give timely notice. The court adopted this argument and held the circumstances justified the application of equitable relief.[28]

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[24] Fidelity & Columbia Trust Co. v. Levin, 128 Misc. 838, 221 N.Y.Supp. 269 (Sup. Ct. 1927), *aff'd,* 221 App. Div. 786, 223 N.Y.Supp. 866 (1927), *aff'd,* 248 N.Y. 551, 162 N.E. 521 (1928).

[25] *Id.* at 844, 221 N.Y.Supp. at 275.

[26] Central Hanover Bank & Trust Co. v. Rabinowitz, 157 Misc. 654, 284 N.Y.Supp. 526 (Sup. Ct. 1935).

[27] Application of Topp, 81 N.Y.S.2d 344 (Sup. Ct. 1948).

[28] The court recognizing the lessee's large investment in the premises (ten thousand dollars) gave him relief. They did so despite the fact that possession of the lease by the lessee's attorney was held to be constructive possession by the lessee.

A case which clearly holds that equity may give relief where there are unexpected circumstances is *Central Hanover Bank & Trust Co. v. Rabinowitz.*[29] The lease stated that the notice to renew should be in writing and delivered in person to the landlord or his agents at a certain address. The landlord died a month before written notice was to be given. It was held that the notice given by the lessee to the landlord's agents was effective, although it was seventeen days late, because no notice could be given at the address named since the landlord was dead.[30]

A contrary result was reached in *Doepfner v. Bowers,*[31] where the supreme court denied specific performance of an option to renew. The lease contained an option to renew if notice was given in writing six months prior to the expiration of the lease. The tenant had used the premises as a drug store, the yearly rent being two thousand dollars. During the period of the lease, the tenant had built a business worth in excess of twenty thousand dollars. The tenant's written notice was nineteen days late. This was due to an illness which left him stranded in Europe and unable to return home. On the day after his return he gave written notice of his intention to renew. The court held that as the giving of notice was a condition precedent to the vesting in the lessee of any right in the renewal term, equity should not grant relief.[32] The court in commenting upon the strict observance of a condition precedent stated:

> This rule may operate harshly in individual cases, but its soundness must be appreciated when the uncertainty and confusion are considered which would result in the conduct of the manifold affairs of business were the rule

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[29] *Supra* note 26.

[30] Lydon, J., dissenting, on the ground that if notice could not be given to the landlord it should have been given to his agents in conformity with the provisions of the lease.

[31] Doepfner v. Bowers, *supra* note 20.

[32] Giddings v. North West Mutual Ins. Co., 102 U.S. 108 (1880).

> stated not the guide for the observance of obligations contractually assumed.[33]

It seems under the circumstances of the case that equitable relief could have been granted. The lessee had a substantial business investment, a reasonable excuse, and there was shown no actual detriment to the lessor.

c. *Improvements by the lessee*

The fact that the lessee in good faith has made improvements in the premises, intending to renew the lease, is the most decisive factor in applying for equitable relief.[34] As was said in *Ringleheim v. Karsch,*[35] where the court took notice of the tenant's large investment:

> The proof satisfies the Court that the failure to exercise the option prior to the expiration of the lease was inadvertent on plaintiff's part. . . . Plaintiff's investment in the store is substantial. . . . Patently it would be contrary to all good judgment and logic for him to waive wilfully the advantages afforded by the option.[36]

This rule was also applied in *New York Life Ins. & Trust Co. v. St. George's Church.*[37] The lease in that case was for a period of sixty-three years and contained a covenant on the part of the lessor to grant a renewal thereof for a further term of twenty-one years upon receiving notice in writing from the lessee prior to the expiration of the term. The lessee during the term erected buildings which at the end of the term were worth thirty thousand dollars. No notice was given, the lessee being misled by the recitals in the assignment into the belief that the lease did not expire until three months after the real date of expiration. The court held that an honest mistake, or ignorance of a fact, is a good ground for relief when the lessee has made such a large investment in the premises.[38] An added factor in favor of the tenant in that case was the length of the lease and the renewal period.[39] Time is not generally considered of the essence in leases of such duration, and unless there is gross laches on the part of the lessee a court of equity will grant relief.[40]

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[33] Doepfner v. Bowers, *supra* note 20, at 556, 106 N.Y.Supp. at 935.

[34] See Fountain v. Stein, 97 Conn. 619, 118 Atl. 47 (1922); ANNOT., 44 A.L.R.2d 1369.

[35] Ringelheim v. Karsch, 112 N.Y.S.2d 130 (Sup. Ct. 1952).

[36] *Id.* at 133.

[37] New York Life Ins. & Trust Co. v. St. George's Church, 64 How. Pr. 511 (N.Y. 1883).

d. Ambiguity in a lease

Jones v. Gianferante[41] is the latest case to come before the New York Court of Appeals in which relief was given to a tenant in such a situation. The tenant was in possession of a ten year lease expiring on October 1, 1951. The leased premises were used for a bowling establishment. The lease contained an option to renew which provided, ". . . [T]he option is to extend for an additional period of ten years and is to be exercised annually thereafter if the party of the second part so desires . . . by giving written notice to the party of the first part on or before the first day of September of each succeeding year."[42] The tenant failed to give his notice of renewal until after the landlord demanded possession of the premises. The landlord demanded a return of the premises on the 6th day of September and the tenant did not give his notice of renewal until the 13th. The court of appeals held that the lease was ambiguous; that the failure to notify was the result of an honest mistake of fact; that the landlord suffered no damage by the brief delay, and that to evict the tenant would cause him a hardship because of his business investment.

Waiver of Notice

Closely analogous to the problem of the failure to give notice is waiver of notice. If the lessee fails to give notice in the manner and time specified, the lessor may waive such performance.[43] A waiver has been defined as the voluntary relinquishment of a known right.[44] Once the performance has been waived the lessor cannot complain that the condition was not performed, and the waiver may occur either by words or conduct. If written notice is required, a mere holding over is not sufficient to constitute a renewal by waiver.[45] If, however, the lessor accepts the rent from a holdover tenant, a contract may arise by implication of law which would extend the lease for the period named in the option.[46] In *Long v. Stafford*,[47] it was held that the provision for notice had been waived by the acceptance of the rent. The court stated, "... Whether the requirement of written notice was for the benefit of the lessees only, or for the benefit of both lessor and lessees, they were competent to waive it ... and a waiver is to be implied from their conduct."[48]

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[38] See also, Jones v. Gianferante, *supra* note 22; Fountain v. Stein, *supra* note 34.

[39] See Seldon v. Camp, 95 Va. 527, 28 S.E. 877 (1898).

[40] 3 WILLISTON, CONTRACTS § 846 (rev. ed. 1936).

[41] Jones v. Gianferante, *supra* note 22.

[42] *Id.* at 138, 111 N.E.2d at 419.

Viany v. Ferran[49] is a further illustration of waiver by conduct. In that case, there was a covenant to renew provided the lessee gave notice of this intention on or before a certain date. The rent for the extended term was to be fixed by arbitration. The parties appointed an arbitrator to fix the rent even though the lessee failed to give written notice as required by the lease. The court held that, since the appointment of arbitrators was an act to be done only after notice, neither party, after making the appointment, could be heard to assert that the notice had not been given.

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[43] Murray v. Harway, 56 N.Y. 337 (1874); Ireland v. Nichols, 46 N.Y. 413 (1871). See also 1 RASCH, LANDLORD & TENANT & SUMMARY PROCEEDINGS § 680–3 (1950).

[44] Kervan v. Townsend, 25 App. Div. 256, 49 N.Y.Supp. 137 (1898); Hecht v. Brandus, 4 Misc. 58, 23 N.Y.Supp. 1004 (N.Y. Ct. of Comm. Pleas 1893); see generally, 44 WORDS & PHRASES 516 (perm. ed. 1940).

[45] Chamberlain v. Dunlop, 126 N.Y. 45, 26 N.E. 966 (1891).

[46] Probst v. Rochester Steam Laundry Co., 171 N.Y. 584, 64 N.E. 504 (1902); Long v. Stafford, 103 N.Y. 274, 8 N.E. 522 (1886); *contra*, McIntosh v. St. Phillip's Church, 12 N.Y. 7, 23 N.E. 984 (1890).

[47] Long v. Stafford, *supra* note 46.

[48] *Id.* at 283, 8 N.E. at 525.

[49] Viany v. Ferran, 5 Abb. Pr. N.S. 110 (N.Y. 1886).

An oral waiver of the requirement of the lease that the notice be in writing is also sufficient.[50] This is so even though the Statute of Frauds makes void all leases for more than one year not evidenced by a writing,[51] the theory being that the terms and conditions of the contract are embodied in the written lease and the effect of the waiver is to make the original lease operative for the renewal period.[52]

Conclusion

There is no marked trend in New York to depart from the proposition that the giving of notice is a condition precedent upon which the right to renew a lease is based. The cases which vary from this rule and give equitable relief to a defaulting tenant, though few in number, are, however, sound law. Each of these cases seems to be based not on one equitable factor but on a combination of such factors. If one factor were to stand alone, it would seem from the cases that it would not be a strong enough ground on which to apply equitable relief.

The predominant factor and the one which runs most consistently through the opinions in the cases granting the tenant relief is that of a substantial investment in the premises. In such instances, it is often the tenant's investment and labor which has made the leasehold valuable. When such is the case, it is a hard result which would deprive him of the fruits of his labor and investment. If he had no intention to renew the lease, then why else would he invest in the premises?

THEODORE PUCHER

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[50] Gaggiano v. Giallorenzi, 26 Misc. 819, 57 N.Y.Supp. 2 (Sup. Ct. 1899).

[51] N.Y. REAL PROPERTY LAW §§ 242, 259.

[52] Gaggiano v. Giallorenzi, *supra* note 50.

Frustrated Remitters in New York

Where the parties to a commercial transaction are strangers or are separated geographically, a bank draft is often used as a method of remitting payment. The mechanics of this remittance are relatively simple. The remitter authorizes his banker to deduct an amount of money from his deposit, or he pays a sum of money to a bank; in return, the bank draws a draft[1] upon another bank payable to the order of whomever the remitter names. The remitter then mails this draft to his creditor who presents it for payment at the drawer's corresponding bank. In the language of the Negotiable Instruments Law, the bank with which the remitter has dealt becomes the drawer of the instrument, and its corresponding bank becomes the drawee. The payee may be whomever the remitter desires; often it is the person to whom he anticipates sending the draft. Where the remitter designates a person other than himself as the payee, the remitter's name does not appear on the instrument in any capacity.

It is doubtful whether the importance of his selection of payee, whether he names himself or the other party to the transaction, often occurs to the remitter.[2] With full expectation that his commercial transaction will be concluded as anticipated, his only purpose for adopting the bank draft as his method of payment is to substitute the credit of the drawer bank for his own credit, thereby encouraging the other party to the transaction to have no concern over whether final payment will be made. Yet, by the seemingly inconsequential decision in selecting a payee, the remitter's legal position may be vastly affected if unforeseen events develop to frustrate a delivery of the draft to the named payee. This frustration may occur in numerous ways: the payee may refuse to accept the draft; a war may result in a failure of communications that makes a delivery impossible; further negotiations of the commercial transaction may cease; or the remitter may simply change his mind and, desiring not to effect the delivery, be willing to submit himself to any action which the payee may have on the underlying transaction.[3]

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[1] A bank draft is an unconditional order from one bank to another to pay the payee a certain sum of money. See N.Y. NEGOTIABLE INSTRUMENTS LAW § 210.

[2] "Nothing but the remitter's confident expectation of passing the instrument to the payee led to its being drawn to the order of the payee rather than to the remitter." Moore, *The Right of the Remitter of a Bill or Note,* 20 COLUM. L. REV. 749, 753 (1920).

Where a delivery to the payee is not effected, the remitter then desires to return the draft [4] to the drawer and recover his money that is represented by the draft. His problems arise when the drawer refuses to cooperate. Where the remitter names some one other than himself as payee, the decisional law in New York has emphasized what rights the remitter does not have, rather than what his rights actually are. The Negotiable Instruments Law does not make a specific provision [5] for clarifying the status of the remitter with respect to the instrument.

The problems of the remitter are most acute if the draft is made payable in a foreign currency that has been devalued between the date that the remitter acquires the draft and the date that he returns it to the drawer. The remitter seeks a return of his original payment but the drawer offers to return only the face amount of the draft at the reduced rate of exchange. The disparity in these amounts is often quite substantial.

The dearth of cases defining the rights of the remitter may be explained by the fact that the most serious ground of controversy is eliminated if the draft is payable in domestic currency: here, the original payment is equal to the face amount of the draft. The draft is an outstanding obligation of the drawer bank. Since the remitter is the only person having a claim upon the undelivered instrument, commercial expediency and good will are an aid to the remitter in recovering without litigation.

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[3] The voluntary and involuntary failures to remit may be properly treated together, in New York, as this comment will disclose. See text accompanying footnote 45 *infra.*

[4] N.Y. NEGOTIABLE INSTRUMENTS LAW § 134 provides that the instrument must be returned to the party paying it.

[5] However, a general provision is made in N.Y. NEGOTIABLE INSTRUMENTS LAW § 7 which provides: "In any case not provided for in this chapter the rules of the law merchant shall govern."

There are two contractual relationships that must be scrutinized in an analysis of the legal position of the parties. The first is the contract whereby the remitter acquires possession of the draft. The second is the contract embodied in the negotiable instrument itself.[6] A remitter seeking to recover his original payment will attempt to exploit the former. The drawer will attempt to restrict the rights of the remitter to the latter exclusively.

May the Remitter Recover His Original Payment?

The leading New York case in which a remitter attempted to recover his original payment is *Kerr S.S. Co. v. Chartered Bank of India.*[7] At the request of the remitter and for a consideration, the bank drew a draft upon its own branch bank in Manila. The draft was made payable in Philippine pesos. The remitter mailed the draft to the payee in Manila; an outbreak of hostilities prevented delivery and the draft was returned to the remitter. Japanese possession of the islands had also ousted the drawer from possession of its branch bank in Manila. Presentment for payment was therefore made impossible, even if delivery had been made to the payee. Since cessation of the war was not immediately foreseeable, the remitter returned the draft to the drawer, demanding restoration of his original payment. Pesos were devalued substantially, and the drawer refused to return either the original amount or the face amount at the lower rate of exchange.

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[6] N.Y. NEGOTIABLE INSTRUMENTS LAW § 111 provides: "The drawer by drawing the instrument . . . engages that on due presentment the instrument will be accepted and paid, or both, according to its tenor, and that if it be dishonored . . . he will pay the amount thereof to the holder. . . ."

[7] Kerr S.S. Co. v. Chartered Bank of India, 292 N.Y. 253, 54 N.E.2d 813 (1944), criticized in 57 HARV. L. REV. 918 (1944) and in 44 COLUM. L. REV. 777 (1944).

The complaint in the *Kerr* case was pleaded upon two different theories of recovery. One was for rescission of the contract whereby the remitter acquired his possession of the draft, and restitution of the original purchase price; the other was in quasi-contract for money had and received.

Both of plaintiff's theories had received some acceptance in the past. The remedy of quasi-contract for money had and received had been suggested as the "only proper remedy" in an article by Professor Chafee.[8] The remedy of rescission and restitution had previously provided a recovery in New York in the case of *Gravenhorst v. Zimmerman.*[9] There, in a situation similar to the *Kerr* case, the remitter had adopted a cable transfer as the method of payment. To effect a cable transfer, the bank telegraphs money to the credit of the payee in a foreign bank. The bank was unable to establish this credit, but refused to refund the remitter's payment. The court interpreted the transaction to be an executory contract[10] for establishing a foreign credit. Until the credit was established, the executory contract could be rescinded when the performance contemplated was frustrated by circumstances beyond the control of either party. The entire payment was recovered despite the fact that the foreign currency had been devalued considerably.

The *Gravenhorst* case drew a distinction between a cable transfer and a bank draft: for a cable transfer, the bank must act affirmatively to establish the foreign credit in order to complete its contract with the remitter; for a bank draft, the drawer has done all that it is obligated to do by completing the instrument and delivering it to the remitter.[11] With respect to bank drafts, this distinction was dictum in the *Gravenhorst* case: the dictum was affirmed as the law in the *Kerr* case.

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[8] Chafee, *Progress of the Law—Bills and Notes,* 33 HARV. L. REV. 255, 264 (1919). No elaboration of this suggestion was provided in the article.

[9] Gravenhorst v. Zimmerman, 236 N.Y. 22, 139 N.E. 766 (1923).

[10] *Id.* at 32, 139 N.E. at 769.

In the *Kerr* case, the court interpreted the transaction between the remitter and the drawer bank as an executed purchase and sale of the contract embodied in the draft.[12] ''Upon such a 'purchase' or exchange the purchaser obtains exactly what he sought—a completed instrument for the transmission of foreign exchange.''[13] Where a draft is drawn on a branch bank, rather than a correspondent bank, a holder has the option to treat the draft as a promissory note.[14] This distinction was treated as without legal significance for the remitter's purpose. Without deciding whether a remitter is a holder, and thus capable of electing the option, the court pointed out[15] that in either case the draft, or promissory note, was made payable in Manila[16] and presentment there was excused.[17] Although the complaint was drawn for a recovery of the purchase price, the opinion would seem to indicate that since presentment was excused, the remitter could not even recover the face amount of the draft.[18]

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[11] *Id.* at 31, 139 N.E. at 769.

[12] Kerr, S.S. Co. v. Chartered Bank of India, *supra* note 7, at 261, 54 N.E.2d at 816. See also International Firearms Co. v. Kingston Trust Co., 6 N.Y.2d 406, 409, 160 N.E.2d 656, 657, 189 N.Y.S.2d 911, 912 (1959) which states of this rule, "This principle has become axiomatic. . . ."

[13] Kerr S.S. Co. v. Chartered Bank of India, *supra* note 7, at 261, 54 N.E.2d at 816.

[14] N.Y. NEGOTIABLE INSTRUMENTS LAW § 214.

[15] Kerr S.S. Co. v. Chartered Bank of India, *supra* note 7, at 261–262, 54 N.E.2d at 816–817.

[16] A draft payable at a branch bank must be presented for payment at the branch and is not sufficiently presented at the home office. See Iron Clad Mfg. Co. v. Sackin, 129 App. Div. 555, 114 N.Y.Supp. 42 (1908).

[17] N.Y. NEGOTIABLE INSTRUMENTS LAW § 141 provides: "Delay in making presentment for payment is execused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause . . . ceases . . . presentment must be made with reasonable diligence." This section would seem to be only for the protection of the holder, not the drawer. There is some question whether a remitter is a holder at all (see note 29 *infra*). The *Kerr* case seems to utilize it as a shield for the drawer, holding its liability in abeyance for the duration of the war.

Other theories have been proposed by remitters, without avail, to avoid restricting their rights only to the face amount of the draft: it has been held that the drawer is not the agent of the remitter to make the requested payment to the payee,[19] and therefore there is no such agency that can be revoked, there is no trust relationship in the money paid by the remitter to the drawer in purchase of the draft,[20] and the remitter has no power to countermand the draft.[21] Unless there is some fraudulent misrepresentation on behalf of the selling bank,[22] the remedies of rescission and restitution and quasi-contract for money had and received are not available in New York State,[23] and the remitter has been restricted in his rights to a recovery on the instrument.

On first impression, this distinction, whether the original purchase price or the amount payable should be recovered, might appear moot if the damages recoverable under the various remedies are examined. A recovery on the theory of rescission or in quasi-contract should be decreased by any injury resulting from the bank's change of position caused by the remitter's delay in transmitting the draft.[24] Thus, if the drawer is forced to maintain a balance with the drawee in order to honor the draft when presented, a devaluation of the foreign currency should result in a loss to the drawer and reduce the remitter's recovery to an amount equivalent to the face value of the draft.

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[18] Beutel characterizes this result of the *Kerr* case as "clearly wrong." BEUTEL'S BRANNAN, NEGOTIABLE INSTRUMENTS LAW 656 (7th ed. 1948).

[19] Safian v. Irving National Bank, 202 App. Div. 459, 196 N.Y.Supp. 141 (1922).

[20] Legniti v. Mechanics & Metals National Bank, 230 N.Y. 415, 130 N.E. 597 (1921); see also Equitable Trust Co. v. Keene, 232 N.Y. 290, 133 N.E. 894 (1922).

[21] International Firearms Co. v. Kingston Trust Co., *supra* note 12. The decision of this case in the appellate division, 6 App. Div.2d 171, 175 N.Y.S.2d 794 (1958), which was reversed by the court of appeals, was discussed in Hart, *N.Y. Survey of Commercial Law*, 33 N.Y.U.L. REV. 1146, 1151 (1958) and was noted in 23 ALBANY L. REV. 169 (1959).

[22] Schweitzer v. Fargo, 255 N.Y. 60, 65, 173 N.E. 923 (1930). See also ANNOT., 153 A.L.R. 393 n. 3 (1944).

[23] Kerr S.S. Co. v. Chartered Bank of India, *supra* note 7.

[24] See RETATEMENT, RESTITUTION § 69 (1937).

It would seem, then, that the recovery would be the same whether the action was brought on or off the instrument. But this is not necessarily true. The drawer may maintain a balance with the drawee in excess of the outstanding drafts drawn upon the drawee. Must the loss fall first upon the drawer or would the devaluation of the drawer's account be shared pro rata with the holders of the outstanding drafts? This problem is complicated by the fact that the draft is not an assignment of specific funds [25] or a claim upon any specific funds of the drawee.[26] The drawer may have no funds on deposit with the drawee, but have a line of credit established with the drawee to be drawn upon as the drafts are presented. Would there be any injury here at all? It should be noted that even in the *Kerr* case it was conceded by the bank that no injury had been sustained that could be attributed to the existence of the draft.[27]

Even if the drawer has been injured by the devaluation, it would seem that the only injury that would reduce the remitter's recovery is that which was caused by the remitter's delay.[28] If the remitter is permitted a reasonable time to effect his delivery to the payee, a substantial injury could occur, in a declining money market, before it would be caused by the remitter's delay. The advantage for international speculation in foreign currencies is apparent here.

If the market for a foreign currency is fluctuating, then a speculator could buy a draft payable in that currency. If the value appreciates, then the draft is presented and the profit is realized. If the currency depreciates in value, then the transaction with the drawer is rescinded and the original purchase price is recovered. This advantage is avoided by permitting the remitter to recover only the face amount of the instrument under all circumstances.

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[25] N.Y. NEGOTIABLE INSTRUMENTS LAW § 211.

[26] N.Y. NEGOTIABLE INSTRUMENTS LAW § 220. See United States Rail Co. v. Wiener, 169 App. Div. 561, 155 N.Y.Supp. 425 (1915).

[27] Kerr S.S. Co. v. Chartered Bank of India, *supra* note 7, at 266, 54 N.E.2d at 819.

[28] See N.Y. NEGOTIABLE INSTRUMENTS LAW § 131.

May the Remitter Recover the Amount Payable?

If the rights of the remitter are restricted to those arising from the instrument itself, how extensive are they? His name does not appear as a party on the face of the draft. It might seem that his interest is limited to a mere power to vest title in the payee. If a delivery of the draft to the payee is impossible, or undesirable, the remitter's rights would appear to be severely restricted.

A threshold problem, before determining the remitter's rights on the instrument, is whether the instrument has had a legal inception that would raise any liability on the instrument from the drawer. It has been neither issued [29] nor negotiated.[30] There is a delivery [31] to the remitter without an issuance to the payee. The question then becomes whether the drawer's liability is raised by issuance to the payee or by the delivery to the remitter? It is seen that the question is not merely academic when it is noted that the named payee has no interest in the instrument until it is further delivered to him by the remitter; [32] unless the drawer is obligated to the remitter on the draft, he has no obligation to anyone until delivery is effected to the payee.

The bank draft is revocable by the drawer until it is delivered with the purpose of giving it effect.[33] It would seem that a delivery for that same purpose should create the drawer's liability at that time. New York has recognized that the remitter does have an interest in the draft before he has delivered it to the payee.[34] Inherent in this recognition would seem to be a realization that the drawer's liability on the draft is established by delivery to the remitter and not by the subsequent issuance to the payee. If the instrument is an obligation of the drawer from the time that he delivers it to the remitter, then on what theory does the obligation run to the remitter?

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[29] " 'Issue' means the first delivery of the instrument . . . to a person who takes it as a holder," and " 'Holder' means the payee or indorsee . . . in possession. . . ." N.Y. NEGOTIABLE INSTRUMENTS LAW § 2.

[30] N.Y. NEGOTIABLE INSTRUMENTS LAW § 60, which provides that a negotiation must constitute the transferee a holder.

[31] " 'Delivery' means transfer of possession . . . from one person to another." N.Y. NEGOTIABLE INSTRUMENTS LAW § 2. Unlike section 60, there is no requirement in section 2 that the transferee be a holder.

[32] See Erskine v. Nemours Trading Co., 239 N.Y. 32, 145 N.E. 273 (1924).

[33] "Every contract on a negotiable instrument is incomplete and revo-

Several theories that would permit the remitter to recover on the draft have been repudiated:

1. The payee is not a fictitious payee so that the instrument would be rendered payable to bearer;[35] nor will the remitter be aided in securing a bearer instrument by actually designating a fictitious person as payee. The knowledge of the drawer that the payee is fictitious determines whether the draft may be treated as an instrument payable to bearer.[36]

2. Reformation of the instrument, to name the remitter as payee, would not be available on the ground that the remitter's creditor was named by mistake; but it has been suggested that a reformation would be possible to conform the instrument to the secondary intention of the parties, by naming the remitter as a substitute payee.[37] No case in

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cable until delivery of the instrument for the purpose of giving effect thereto. . . ." N.Y. NEGOTIABLE INSTRUMENTS LAW § 35.

[34] See International Firearms Co. v. Kingston Trust Co., *supra* note 12. In that case, an action by the payee against the remitter, in rem jurisdiction over the remitter was obtained by attachment of the draft prior to delivery of the instrument to the payee.

[35] "The instrument is payable to bearer . . . when it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable. . . ." N.Y. NEGOTIABLE INSTRUMENTS LAW § 28(3).

[36] *Ibid.* See generally Hall v. Bank of Blasdell, 306 N.Y. 336, 118 N.E.2d 464 (1954).

[37] Beutel, *Rights of Remitters And Other Owners Not Within The Tenor Of Negotiable Instruments,* 12 MINN. L. REV. 584, 591 (1928).

which this solution was attempted seems to have been reported in New York.

3. The draft does not operate as an assignment of the drawer's funds on deposit with the drawee.[38]

The Negotiable Instruments Law does not make a specific provision for the claims of remitters upon the draft. By virtue of a general provision of the statute, their rights are governed by the law merchant.[39] There is a touch of irony in the modern difficulty which the remitter has in establishing his rights upon the instrument.[40] In the earliest development of bills of exchange it was the payee who was hard put to it to recover on the instrument:[41] at that time the bill of exchange was non-negotiable.[42] A distinction between the mechanics of the remittance in those days and today should be noted also. In modern commercial practice the remitter acquires possession of the draft and transmits it himself to the payee. The earlier practice seems to have been for the drawer to transmit the draft.

The draft, under the earliest law merchant, was a four-party instrument and the remitter's name appeared directly on the face of it.[43] His rights against the drawer were apparently quite well settled.

> ". . . [T]he person receiving money for exchange promises to pay the agreed amount of the money to be exchanged to another, who is named in the instrument by the creditor who has advanced the money, that other being usually the correspondent of the creditor; and he further promises to send the public instrument to the creditor; and, if he does not fulfil his contract, he promises

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[38] N.Y. NEGOTIABLE INSTRUMENTS LAW § 211.

[39] N.Y. NEGOTIABLE INSTRUMENTS LAW § 7, set forth *supra* note 5.

[40] For an analysis of the development of the law merchant governing bills of exchange, see 8 HOLDSWORTH, HISTORY OF ENGLISH LAW 113–177 (1926).

[41] *Id.* at 139–140.

[42] *Id.* at 140.

[43] Beutel, *supra* note 37, at 591–592.

> to repay to the creditor, with interest, the sum received in the place where he received it." (Footnote omitted.)[44]

The voluntary withholding of delivery of the draft apparently was not desired by the remitter at this early time. Where the drawer was to deliver the draft to the payee, it would not seem that this means of payment would be utilized until the remitter's debt with the payee was established. Where the remitter acquires possession of the draft, however, he frequently purchases the bank draft in anticipation of a debt with the payee.[45] If the debt does not materialize, he will voluntarily withhold future delivery.

With the growth of the concept of negotiability, the rights of the payee were gradually formulated.[46] But the rights which the payee acquired were those which the remitter formerly possessed. The payee's rights to recover on the draft were even rationalized, at first, by the concept that the remitter was merely the agent of the payee in obtaining the draft.[47] This agency has since been repudiated.[48] When the law with respect to bills of exchange was codified,[49] it was the rights of the payee that were enumerated in the Negotiable Instruments Law. The rights of the remitters were omitted. It was this omission, and the absence of the remitter's name on the face of the draft, that probably furnished the impetus to claims by remitters to recover their original payment. Their attempts have been to no avail in New York.

While the courts in New York apparently have not had occasion to enforce the remitter's rights on the draft, the opinion in the *Kerr* case contained a dictum that "Until title to the instrument is transferred to the payee the 're-mitter' or 'purchaser' remains its owner and in some circumstances may sue upon the instrument as if named as payee.''[50] But recovery, even of the face amount, was denied in the *Kerr* case because presentment for payment, according to the terms of the bank draft, was required to be made in Manila, and presentment there was excused for the duration of the war. Presentment for payment may be dispensed with where it can not be made after the exercise of reasonable diligence.[51] Even though the drawee bank was under Japanese siege, the *Kerr* case required the remitter to present the instrument to the drawee for payment, before the drawer would become liable to the remitter.

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[44] 8 HOLDSWORTH, *op. cit. supra* note 40 at 136.

[45] This event occurred in the *International Firearms* case, *supra* note 12.

[46] 8 HOLDSWORTH, *op. cit. supra* note 40, at 140–146.

[47] *Id.* at 162.

[48] Safian v. Irving National Bank, 202 App. Div. 459, 196 N.Y.Supp. 141 (1922).

[49] See Commercial National Bank v. Zimmerman, 185 N.Y. 210, 77 N.E. 1020 (1906).

This holding of the *Kerr* case, that presentation must be made to the drawee even though temporarily impossible, discloses a condition to the drawer's obligation to the remitter that seems futile. The statute requires such a presentation by the payee.[52] But since the remitter's name does not appear on the face of the instrument, a drawee would incur considerable risk in making payment to a person who, from the face of the draft, has no apparent claim to it. It would seem that the drawee would probably refuse payment. There is a substantial burden on the remitter here, where he must make a presentment that will probably be refused. The bank draft was purchased by the remitter in order to make a payment easier in a distant place. Now he must make arrangements to have this draft presented for payment, at the distant place, with little hope of receiving payment there. If the presentation to the drawee will usually be futile, then the burden seems to be unnecessary since it will afford small protection to the drawer.

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[50] Kerr S.S. Co. v. Chartered Bank of India, *supra* note 7, at 262, 54 N.E.2d at 817.

[51] N.Y. NEGOTIABLE INSTRUMENTS LAW § 142.

[52] N.Y. NEGOTIABLE INSTRUMENTS LAW § 130. See also Auerbach v. Barrett, 214 App. Div. 279, 212 N.Y.Supp. 141 (1925), where the remitter, who was also the payee, was required to make presentment to the drawee before the drawer's liability on the instrument arose.

Summary

The remitter's rights are only those arising from the instrument itself. These are determined from the law merchant. If he is unable or unwilling to remit the draft to the payee, he is the owner of it and may recover the face amount of the instrument. Presentation to the drawee is still required. If the payee refuses to accept the draft, or the remitter refuses to deliver it to the payee, then the remitter's rights against the drawer accrue immediately upon dishonor by the drawee. Even though presentation is temporarily excused, the remitter's rights against the drawer will not accrue until the cause of delay ceases to operate and the instrument is then presented and dishonored.

It should be noted that the problems dealt with in this comment apparently may be avoided by the remitter through the simple expedient of naming himself as the payee. Where this is done, the remitter's rights, as a payee, are clearly defined by the Negotiable Instruments Law.

BRADFORD S. ALLEN

State Usury Laws as Applied to Recent F.H.A. Regulations

Usury is the contracting by a borrower to pay a certain amount of interest above a legally set rate to the lender on a loan, or forbearance to call a loan, of money. Usury laws, in one form or another, have existed since Biblical times. At first, usury was purely a religious concept, a distinction later developed between moral and legal usury.[1] Except for some of the more recent legislation in respect to small loans and consumer credit, the usury laws of the various states have been fairly well defined and adjudicated.[2] Three states have no general usury laws. In the remainder of the states and territories the maximum rate of interest which may legally be charged on a loan ranges from a liberal 30 percent on loans over fifty dollars in Rhode Island to a low 6 percent in New York and ten other states. The penalties for contracting to take a usurious rate of interest vary from mere forfeiture of interest above the maximum rate, to a forfeiture of all principal and interest, as is the case in New York. In most states, usurious interest if paid can be recovered back; in some states, double the usurious interest can be recovered if suit is brought within a specified time.[3]

General usury laws apply in most instances to loans secured by real estate; however, in some states special regulations govern bank loans on real estate mortgages. There were few problems in recent years involving interpretation of usury statutes until September 23, 1959. On that date, the Congress increased the maximum allowable interest rate on Federal Housing Administration insured mortgages on most private housing from 5¼ to 5¾ per centum per annum, exclusive of a provision allowing an additional service charge of ½ of 1 percent.[4] This increase, although slight, has raised a number of usury problems in states having a 6 percent maximum rate. While this article is concerned principally with the situation in New York, most of the more general principles are equally applicable in other jurisdictions.

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[1] See Dunham v. Gould, 16 Johns. 367 (N.Y. 1819); RYAN, USURY & USURY LAWS 29 ff. (1924).

[2] Horack, *A Survey of the General Usury Laws*, 8 LAW & CONTEMP. PROB. 36–53 (1941).

[3] SHERMAN, MORTGAGE AND REAL ESTATE INVESTMENT GUIDE, *passim* (1960); Kraus, *Usury Laws Seen in Unusual Role*, N.Y. Times, March 6, 1960, § 3, p. 1, col. 3.

In New York State both the legal and the highest allowable interest rates are set at 6 percentum per annum by section 370 of the General Business Law which states:

> The rate of interest upon the loan or forbearance of any money, goods, or things, in action, except as otherwise provided by law, shall be six dollars upon one hundred dollars, for one year, and at that rate, for a greater or less sum, or for a longer or shorter time.

Section 371 of the same law states:

> No person or corporation shall, directly or indirectly, take or receive in money, goods or things in action, or in any other way, any greater sum or greater value, for the loan or forbearance of any money, goods or things in action, than is above prescribed.

In today's money market where the prime rate is 5 percent, the Federal Reserve discount rate is 4 percent, and call loans on stock exchange collateral is 5½ percent,[5] the New York maximum rate would seem to be placed at an artificially low level.[6]

There are several specific exceptions to the 6 percent maximum. Small loans by certain lenders,[7] loans of not less than $5,000 secured by negotiable instruments,[8] loans to corporations,[9] and other instances not particularly concerning us here.

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[4] 6 FED. BANKING L. REP. No. 5, pp. 4–7 (October 16, 1959).

[5] AMERICAN BANKER, p. 10, March 1, 1960.

[6] For a discussion of the economic theory of the function and determination of interest rates, see KNIGHT & HINES, ECONOMICS—AN INTRODUCTORY ANALYSIS OF THE LEVEL, COMPOSITION AND DISTRIBUTION OF ECONOMIC INCOME at 245–248 (1952).

[7] Lowry v. Collateral Loan Ass'n, 62 App. Div. 240, 71 N.Y. Supp. 822 (1901).

The penalty for taking usury in New York is strict. The contract of debt is declared void and neither principal nor interest may be recovered under a usurious contract.[10] However, if usurious interest is paid, the borrower may recover the amount so paid above the legal rate, if an action is brought within one year after such payment.[11]

The general statutes of the state applicable to usury have been modified by the Banking Law where a bank is the lender.[12] The rates of interest which may be charged by banks and trust companies, and the penalty for usury charged by them, is modified by section 108 of the New York State Banking Law. It also limits the interest chargeable to 6 percent, except in certain instances, but provides that in respect to the penalty for taking usury, only the interest is uncollectible. The original debt remains a binding obligation of the borrower. If usurious interest is paid, the borrower may recover back twice the interest paid if an action is brought within two years. This section also allows banks to discount notes in advance.[13]

Whether mutual savings banks and saving and loan associations are governed by section 108 of the Banking Law, or fall under the general usury provisions of the General Business Law, is an unsettled question. The court in *Lyons v. National Sav. Bank*[14] refused to consider and pass on this question, but preferred to decide the case on other grounds. However, because of the unfair advantage which might otherwise arise, it would seem that if the courts were forced to resolve the controversy, they would probably hold that savings banks are governed by the special provisions of the Banking Law, even though they are not specifically designated as coming under that law and in fact are distinguished from banks and trust companies in section 2 of the Banking Law. A bill sponsored by the Law Revision Commission has been introduced in this session of the legislature which would definitely put savings banks under the usury provisions of the Banking Law.[15]

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[8] N.Y. GEN. BUS. LAW § 379; *In re* Miller, 3 Misc. 2d 632, 151 N.Y.S. 2d 149 (Surr. Ct., Westchester Co., 1956).

[9] N.Y. GEN. BUS. LAW § 374.

[10] N.Y. GEN. BUS. LAW § 373.

[11] N.Y. GEN. BUS. LAW § 372; Graham v. Weiss, 3 Misc.2d 28, 149 N.Y.S.2d 676 (Special Term, Queens Co., 1956).

[12] People v. Young, 153 App. Div. 567, 138 N.Y.Supp. 50, *aff'd,* 207 N.Y. 522, 101 N.E. 451 (1912).

[13] Bank v. Savery, 82 N.Y. 291 (1880).

[14] 200 Misc. 652, 110 N.Y.S.2d 564 (Albany County Ct. 1951).

To determine whether a contract is usurious, the courts will scrutinize the entire transaction. In the case of *Clafin v. Boorum,*[16] the defendant firm gave notes to a broker at interest not above 6 percent. The bank sold them to a third party at a 10 percent discount before their legal inception. The court held that since the third party was the real lender acting through the broker, as agent, to exact more than the permissive rate, the notes are therefore void. Since the notes were void at the inception, no subsequent transaction could make them valid. The *Vee Bee Serv. Co. v. Household Fin. Co.*[17] case involved a system of personal loans by certain banks by the terms of which the borrower needed neither indorsers nor co-makers, but was required to pay 5 percent of the loan as surety collateral which went partly to the lending bank and partly to a surety company. It was held that the only services chargeable to the borrower, which would not be considered interest, were those reasonably incurred on his behalf in connection with the particular loan. Extra charges to reimburse the lender for part of its general overhead expenses of carrying on its business are usurious if total charges are above the statutory rate. A charge which purports to compensate for a special hazard that is attached to a loan will be considered interest even though under another name, but usurious if the so-called "hazard" is a mere subterfuge and does not in fact increase the lender's risk.[18]

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[15] See N.Y. Law Revision Commission, Leg. Doc. (1960) No. 65(B). Since this comment was written, the proposed bill has been passed by both houses of the legislature.

[16] 122 N.Y. 385, 25 N.E. 360 (1890).

[17] 51 N.Y.S.2d 590 (1944), *aff'd,* 269 App. Div. 772, 55 N.Y.S.2d 570 (1945).

In order for a transaction to be usurious, it must be such at its inception. The defense of usury must be founded on a loan or forbearance of money, and if this does not exist there can be no usury no matter how unconscionable the contract may be.[19] That a bank, which is a holder in due course of an instrument which was void for usury as between the original parties,[20] can enforce the contract of debt seems to be settled. The case of *Schlesinger v. Gilhooly*,[21] decided in 1907, holds that such notes, void at their inception for usury, are valid in the hands of a bank which is a holder in due course.[22] However, it is said that this principle does not apply when the holder in due course is an individual.[23]

The borrower cannot by his own act make an otherwise binding contract usurious. The mere payment of usurious interest does not render a debt void in the absence of an agreement of the parties to pay such illegal interest. There must be a usurious intent in order to interpose the defense of usury. This was the holding in *Rosenstein v. Fox*,[24] where the defendant paid more than 6 percent on a loan but there was no showing of any agreement as to interest.

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[18] See London Realty Co. v. Riordan, 207 N.Y. 264, 100 N.E. 800 (1913); Del Rubio v. Duchesne, 284 App. Div. 89, 130 N.Y.S.2d 572 (1954).

[19] Tchlenoff v. Dyner, 178 Misc. 790, 36 N.Y.S.2d 514 (Special Term, N.Y. County 1942); Thomas v. Knickerbocker Operating Co., 202 Misc. 286, 108 N.Y.S.2d 234 (Special Term, N.Y. County 1951).

[20] The defense of usury is a personal one and may be waived by the borrower. It is sometimes said that a conveyance subject to a usurious mortgage is a waiver. But where the grantee does not assume the mortgage and the conveyance is not made subject to it, there is no such waiver and the defense may be interposed. Hartley v. Harrison, 24 N.Y. 170 (1861); Del Rubio v. Duchesne, 284 App. Div. 89, 130 N.Y.S.2d 572 (1954); Howard v. Kirkpatrick, 30 N.Y.S.2d 166 (Spec. Term, Broome Co. 1941), *aff'd,* 263 App. Div. 776, 31 N.Y.S.2d 182 (1941).

[21] 189 N.Y. 1, 81 N.E. 619 (1907); see also Reel v. Porcella, 263 App. Div. 621, 34 N.Y.S.2d 80 (1942). But see Sabine v. Paine, 223 N.Y. 401, 119 N.E. 849 (1918).

[22] See also Schlesinger v. Lehmaier, 191 N.Y. 69, 83 N.E. 657 (1908).

[23] Redfield, *Could You Lose the Principal or Interest on Your Mortgage Investments Because of Usury?*, 75 BANKING L.J. 737, 738 (1958).

It has recently been held that a charge of 3 percent on the original amount of a mortgage, demanded by the mortgagee in order to allow the mortgagor to prepay the debt, is not usurious. In *Lyons v. National Sav. Bank*, the court held that this prepayment charge was not interest but was consideration for the making of a new contract terminating the debt evidenced by the original bond and mortgage.[25]

While section 370 of the General Business Law, by its wording, limits individual lenders to taking simple interest, banking institutions and insurance companies are allowed by special provision to charge compound interest. The courts have held that giving this exemption to certain lenders is not against the public policy of the state.[26]

A corporation may not interpose the defense of usury in New York.[27] However, since April 26, 1957, a corporation may defend on the ground of usury provided such corporation has as its principal asset the ownership of a one- or two-family dwelling and the corporation was organized or acquired within six months prior to its execution of the usurious note and mortgage which created a lien on that same dwelling.[28] The two *Sohmer Factors Co.*[29] cases present an interesting question as to the application of this exemption. One case tried in special term, Queens County, held that the amendment was retroactive, and a corporation which came under the amendment could plead usury in respect to a mortgage executed in 1954. Less than five months later the appellate term, second department, in a case involving the same plaintiff, on substantially the same type of facts, decided that the amendment to section 374 was not retroactive and the defense was not available to the same corporation which executed another mortgage at a later date in 1954. The appellate term case would seem to be a more influential precedent.

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[24] 150 N.Y. 354, 44 N.E. 1027 (1896). As to intent, see Brown v. Robinson, 224 N.Y. 301, 120 N.E. 694 (1918); Morton v. Thurber, 85 N.Y. 550 (1881); East N.Y. Sav. Bank v. Lang, 261 App. Div. 981, 26 N.Y.S.2d 21 (1941).

[25] 280 App. Div. 339, 113 N.Y.S.2d 695 (1952), *reversing* 200 Misc. 652, 110 N.Y.S.2d 564 (Albany County Ct., 1951); Feldman v. Kings Highway Sav. Bank, 278 App. Div. 589, 102 N.Y.S.2d 306 (1951), *aff'd*, 303 N.Y. 675, 102 N.E. 835 (1951).

[26] Jones v. Mass. Mut. Life Ins. Co., 204 Misc. 1096, 126 N.Y.S.2d 630 (Sup. Ct. 1953), *aff'd*, 284 App. Div. 832, 131 N.Y.S.2d 920, *rehearing and appeal denied*, 284 App. Div. 933, 135 N.Y.S.2d 616 (1954), *appeal dismissed*, 308 N.Y. 771, 125 N.E.2d 116 (1955).

[27] For the history of the provision and the case leading up to it, see Dry Dock Bank v. American Life Ins. & Trust Co., 3 N.Y. 344 (1849); see also ROBINSON, NEW YORK REAL ESTATE LAW 606 (1930); Jenkins v. Moyse, 254 N.Y. 319, 172 N.E. 521 (1930).

Another problem arises in the field of conflict of laws involving the question of whether the law of the situs of the property or the place where the contract is made governs the validity of a mortgage, but it seems to be resolved by the theory that since the mortgage follows the debt, the validity of the mortgage depends on the validity of the agreement on which it was founded. The United States Supreme Court said in *DeWolf v. Johnson:*[30]

> . . . The point is established, that the mere taking of foreign security does not alter the locality of the contract with regard to the legal interest. Taking foreign security does not necessarily draw after it the consequence that the contract is to be fulfilled where the security is taken. The legal fulfilment of a contract of loan, on the part of the borrower, is repayment of the money, and the security given is but the means of securing what he has contracted for, which, in the eye of the law, is to pay where he borrows, unless another place of payment be expressly designated by the contract.[31]

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[28] N.Y. GEN. BUS. LAW § 374, as amended by N.Y. SESS. LAWS 1957 ch. 968.

[29] Sohmer Factors Corp. v. 187–20 Tioga Drive Corp., 9 Misc.2d 862, 169 N.Y.S.2d 557 (Sup. Ct., Queens Co. 1957); *contra,* Sohmer Factors Corp. v. 278 Corp., 13 Misc.2d 142, 172 N.Y.S.2d 886 (App. Term, 2d Dep't 1958).

[30] 23 U.S. (10 Wheat.) 367 (1825).

[31] *Id.* at 383. On the conflict of laws problem generally, see Man-

National banks are governed by the federal banking law.[32] The rate of interest on loans, discounts and purchases by national banks has been set by Congress at a rate of one percent in excess of the discount rate on ninety-day commercial paper or at the rate allowed by the laws of the state where the bank is located, whichever rate is greater, except that national banks are limited to the rate allowed to be charged by state banks.[33] The penalty against a national bank for taking excessive interest is a forfeiture of the entire interest, and if usurious interest is paid, the borrower may recover back twice the amount of the interest so paid provided his action is commenced within two years from the time the usurious transaction occurred.[34] It has been held that this two-year statute of limitations for bringing an action commences running from payment of the illegal interest and not from the date of the contract of indebtedness.[35]

The federal government has exclusive jurisdiction over the actions of national banks, and while the rate of interest which may be charged by them is determined by application of state law, the charging of usury is violative only of federal law and not of state law.[36] In *Evans v. National Bank,* the Supreme Court stated:

> The National Bank Act establishes a system of general regulations. It adopts usury laws of the states only in so far as they severally fix the rate of interest.[37]

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hattan Life Ins. Co. v. Johnson, 188 N.Y. 108, 80 N.E. 658 (1907), *affirming* 115 App. Div. 429, 101 N.Y. Supp. 65 (1906); Dickinson v. Edwards, 77 N.Y. 573 (1879); Jacks v. Nichols, 5 N.Y. 178 (1851); 2 BEALE, CONFLICT OF LAWS § 347.4 (1935).

[32] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

[33] 12 U.S.C. § 85 (1958).

[34] 12 U.S.C. § 86 (1958).

[35] McCarthy v. First Nat'l Bank, 223 U.S. 493 (1912); Panos v. Smith, 116 F.2d 445 (6th Cir. 1940).

[36] Barnet v. National Bank, 98 U.S. 555 (1878); Farmers & Mechanics Nat'l Bank v. Dearing, 91 U.S. 29 (1875); Tiffany v. National Bank, 85 U.S. 409 (1874); Rockland-Atlas Nat'l Bank v. Murphy, 110 N.E.2d 638 (Mass. 1953); National City Bank v. Levine, 115 Misc. 132, 277 N.Y. Supp. 664 (1935).

[37] 251 U.S. 108, 111 (1919).

This leads to a consideration of the provisions of the National Housing Act which regulate the granting of F.H.A. insured mortgages. This act establishes requirements for eligibility for insurance under the act. Among other prerequisites it provides that in order to be eligible for such insurance the mortgage shall—

> Bear interest (exclusive of premium charges for insurance and service charges if any) at not to exceed 5 per centum per annum on the amount of the principal obligation outstanding at any time, or not to exceed such per centum per annum not in excess of 6 per centum as the Commissioner finds necessary to meet the mortgage market.[38]

This same act also states,

> The Commissioner is authorized to fix a premium charge for the insurance of mortgages under this subchapter, but in the case of any mortgage such charge shall not be less than an amount equivalent to one-half of 1 per centum per annum nor more than an amount equivalent to 1 per centum per annum of the amount of the principal obligation of the mortgage outstanding at any time, without taking into account delinquent payments or prepayments. . . .[39]

The preceding section sets the limits within which these charges can be made. An administrative rule of the F.H.A. provides:

> The mortgage may bear interest at such rate as may be agreed upon by the mortgagee and mortgagor, but in no case shall such interest rate be in excess of 5¾ percent. Interest shall be payable in monthly installments on the principal then outstanding.[40]

This 5¾ percent maximum interest rate covers most private dwelling mortgages, and has been in effect since September 23, 1959. Prior to this date the effective rate on F.H.A. mortgages was 5¼ percent. Under the 5¼ percent rate, usury problems were not involved because any extra charges added to this rate would seldom bring the total interest to a rate above 6 percent, which is the lowest maximum rate in any of the states.

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[38] 12 U.S.C. § 1709 (b) (5).

[39] 12 U.S.C. § 1709 (c).

[40] 24 C.F.R. § 221.19; PRATT, FEDERAL BANKING LAW SERVICE ¶ 4609.19.

A usury problem can arise now in the eleven states having a 6 percent interest maximum, when the one-half of one percent insurance premium charge is added to the 5¾ percent interest rate, resulting in a rate of 6¼ percent of the principal obligation payable by the mortgagor. While this question has arisen in other states, it has not been litigated in New York.

In Maryland, which has a 6 percent maximum rate, the State Attorney General, on January 5 of this year issued an opinion to the Deputy Bank Commissioner in which he stated that this one-half of one percent insurance premium is not interest. After a brief review of the applicable laws, he said:

> This analysis shows that the F.H.A. mortgage insurance is in effect a guarantee of the mortgage and the borrower pays the F.H.A. for this guarantee. Both the payment and the guarantee go to the security for the loan and benefit the lender only to the extent that his security is made certain. Thus, in effect, F.H.A. insurance is itself security for a loan. It is an undertaking by the Government to guarantee a loan and such undertaking is collateral to the actual lending of the money. . . . It appears to us that the transaction involved is not the type condemned by the courts, as emphasized by the fact that the lender retains less than the legal rate of interest in the case of F.H.A. insured mortgages.[41]

Also, early this year, a memorandum opinion was rendered in the chancery court of Shelby, Tennessee, in the case of *Silver Homes, Inc. v. Marx & Bensdorf, Inc.*[42] That case involved a bill for a declaratory judgment, to determine whether a 5¾ percent F.H.A. mortgage with an added ½ of 1 percent insurance premium brought the total interest rate above the 6 percent maximum allowable in Tennessee. The named plaintiff was a builder who obtained an F.H.A. mortgage commitment from the defendant. The complaint alleged that in reliance on such commitment, plaintiff began building several homes and had contracted to sell one of the completed homes to complainant Gann if he could qualify for an F.H.A. mortgage; that Gann had qualified but that defendant had breached its commitment and refused to make the loan on the ground that it was usurious. In reaching his decision that the loans in question would not be usurious, the Chancellor stated:

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[41] The Daily Record, Baltimore, Thursday, January 7, 1960, p. 1, col. 5.

[42] Doc. No. 62154-3 R.D. Tenn. (January 1960).

> It is true that the National Housing Act imposes upon the mortgagee the obligation of paying the mortgage insurance premium, yet it is admitted that no part of this payment is made to the mortgagee except as a convenience or as a conduit, because all payments are remitted to the F.H.A., and, under no circumstances, is any excess or return premium paid to anyone other than the borrower or his successor in interest. And an examination of the Act and the regulations would indicate that this charge is expected to be passed on to the borrower. In effect, the lender collects the F.H.A. charges from the borrower and remits to the Commissioner just as he collects the taxes and hazard insurance premiums and remits them to the proper parties. An analogous practice is that of the retail sales tax where the tax upon the sellor is passed on to the buyer. *Hooten v. Carson* (1948), 186 Tenn. 282, 209 S.W. 2d 273.
>
> Since the charges in question are not compensation paid by the borrower to the lender for the use of money, they cannot be classified as interest.[43]

This case also involved a one percent prepayment charge, but the effect of that charge was not discussed in detail by the court.

It appears that there is little question that the courts in New York would also decide that the one-half of one percent insurance premium was not interest. This provision is little different from the requirement of a ''standard mortgagee clause'' in a fire insurance policy where the premiums are payable by the mortgagor, the proceeds inuring in case of loss to the benefit of the mortgagee. The court of appeals has held in *Martorano v. Capital Fin. Corp.*,[44] that where the lender requires a borrower to obtain additional insurance on a chattel that is to be mortgaged as security for a loan, the transaction is not usurious even though the borrower must incur additional expense in acquiring the insurance.

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[43] This decision was affirmed on March 7, 1960, by the supreme court of Tennessee. See 6 Fed. Bank Law Rep. no. 16, p. 5.

Consideration should also be given to the usurious aspects of compensation paid to the mortgagee for the expenses which he incurs in originating and closing the loan. The F.H.A. regulations provide as follows:

> (a) The mortgagee may collect from the mortgagor the following charges, fees or discounts: . . .
>
> (2) A charge to compensate the mortgagee for expenses incurred in originating and closing the loan, the charge not to exceed:
>
> > (i) $20.00 or 1 percent of the original principal amount of the mortgage, whichever is the greater; or
> >
> > (ii) $50.00 or 2½ percent of the original principal amount of the mortgage, whichever is the greater, with respect to mortgages on property under construction or to be constructed where mortgagee makes partial disbursements and inspections of the property during the progress of construction.[45]

Although it could be held that this origination fee would not constitute interest if it is a reasonable charge for actual expenses incurred and services rendered by the bank in giving a mortgage, it is likely that the courts in New York would construe it to be interest disguised by another name, and usurious if it brought the actual rate above 6 percent. Such a holding would not cause as much trouble as it would seem at first glance. An origination fee under this section is paid only once, at the time of making the loan, and is not a continuing annual charge. Although there is a question in some states, in New York this charge could probably be prorated over the life of the mortgage in order to determine if the interest charged was above 6 percent.[46] The decision in *Feldman v. Kings Highway Sav. Bank*,[47] that a prepayment charge of $2,000.00 on a $15,000.00 mortgage was not usurious, was based partly on the fact that the entire amount of interest paid, if spread over the duration of the loan, was not above 6 percent.

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[44] 289 N.Y. 21, 43 N.E.2d 705 (1942), *reversing* 263 App. Div. 79, 31 N.Y.S.2d 643 (1941).

[45] 24 C.F.R. § 221.26.

There might be some usury problems involved where mortgages are purchased at discount, but here the charge is usually borne by a primary lender or mortgage broker and not by the borrower. A bank may buy mortgages from a prior mortgagee at a discount, if it is a bona fide transaction, without violation of the usury laws which apply only to the original mortgagor. The F.H.A. no longer has control over discounts paid by anyone but the mortgagor, and the F.H.A. will not approve a discount payable by the mortgagor except in certain cases involving construction mortgages or refinancing of a prior mortgage.[48] As has previously been pointed out [49] compensation received by a mortgagee for permitting the prepayment of the mortgage before maturity does not constitute interest in New York.

The real problem of usury in respect to F.H.A. mortgages arises under a regulation which provides:

> Mortgages involving a principal obligation not in excess of $8,000.00 *may* contain a provision requiring the mortgagor to pay to the mortgagee an annual service charge at such rate as may be agreed upon between the mortgagee and mortgagor, but in no case shall such service charge exceed one-half of one percent per annum. Any such service charge shall be payable in monthly installments on the principal then outstanding. (Emphasis added.) [50]

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[46] Redfield, *supra* note 23, at 739–740.

[47] *Supra* note 25.

[48] See Krevalt v. Turover, 39 A.2d 207 (D.C. 1944); but see National Bank v. Lewis, 81 N.Y. 15 (1880).

[49] See cases cited *supra* note 25.

[50] 24 C.F.R. § 221.22 (b).

This regulation covers the so-called "203 (i) mortgages"[51] on single family houses in outlying areas occupied by the owner. Although no cases have been reported on the precise point in New York, it would probably be considered interest disguised under another name in accord with the ruling in the *Vee Bee Service Co.*[52] case or in *London Realty Co. v. Riordon*[53] where it was held that the court will look through a transaction to its real intent and purpose and hold a loan illegal where payment is made for such an ostensible purpose as defraying the expenses of a loan, in any case where such purpose is a cover for usury.[54] Therefore, this service charge of one-half of one percent added to the F.H.A. maximum of 5¾ percent would bring the amount of interest paid by the mortgagor to a usurious 6¼ percent. This service charge is permissive only and can in no way be considered as being set by the F.H.A. This eliminates the necessity of deciding whether there is any conflict between state and federal law on this subject.

The one remaining question is whether the entire issue is rendered moot by section 201 of the New York Unconsolidated Laws.[55] This F.H.A.-inspired legislation has been on the statute books in New York since 1934, but no cases arising out of its application seem to be reported in the New York courts. Its purpose is to authorize banks, private bankers and insurance companies to make loans under the National Housing Act, subject to such regulations as the Superintendent of Insurance or the Banking Board determines to be necessary and proper. The pertinent provision of this act is as follows:

> *No law of this State* prescribing the nature, amount or form of security or requiring security upon which loans

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[51] 12 U.S.C.A. § 1709; PRATT, FEDERAL BANKING LAW SERVICE ¶ 4510.1.

[52] Vee Bee Serv. Co. v. Household Fin. Co., *supra* note 17.

[53] 207 N.Y. 264, 100 N.E. 800 (1913).

[54] See also Union National Bank v. Louisville, N.A. & C.R.R., 163 U.S. 325 (1896); Panos v. Smith, 116 F.2d 445 (6th Cir. 1940).

[55] N.Y. Sess. Laws 1934, ch. 897, § 1, as amended.

> or advances of credit may be made, or *prescribing or limiting interest rates upon loans or advances of credit,* or prescribing or limiting the period for which loans or advances of credit may be made or limiting the amount of any class of loans, advances of credit or purchases which may be made, . . . *shall be deemed to apply to loans, advances of credit or purchases made pursuant to the foregoing paragraphs (a) and (b).*[56] (Emphasis added.)

A reading of the italicized parts, as the import of the section, suggests that state laws limiting interest rates and pertaining to the taking of usury, are rendered inapplicable to F.H.A. mortgages. That is the view of one authority in the mortgage investment field.[57] It would seem, however, that the only interest rate exempted from state usury laws under section 201 of the New York Unconsolidated Laws is that established by F.H.A. Regulation 221.19,[58] presently at 5¾ percent, under authority of the National Housing Act.[59] This regulation does not exempt an added one-half of one percent service charge which is not set by law but which is merely a permissive maximum,[60] when agreed upon between the mortgagee and mortgagor and does not have to be charged. Therefore, in spite of section 201, it seems that a loan would be considered usurious if the only thing which brings the interest rate above the legal maximum is the addition of such a service charge. In fact, section 201 might only exempt F.H.A. mortgages from the interest and usury provisions of the General Business Law and leave in effect the provisions of the Banking Law and the Insurance Law. If the foregoing contention is true, a defense of usury would not be rendered ineffective by section 201 of the New York Unconsolidated Laws unless the present 5¾ percent rate was raised by Congress to a rate over 6 percent. In that event, a defense of usury to an F.H.A. mortgage would probably be disallowed if interposed against an institution covered by section 201.

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[56] N.Y. Unconsolidated Laws (McKinney's 1949) § 201, as amended by L. 1957, ch. 692.

[57] Redfield, *supra* note 23 at 740–741, in reliance on an opinion by Joseph A. Broderick, former Superintendent of the New York Banking Department, to Governor Lehman on August 23, 1934.

[58] 24 C.F.R. § 221.19.

[59] 12 U.S.C. § 1709 (1958).

[60] 24 C.F.R. § 221.22.

In conclusion, it must be remembered that in all transactions involving a question of usury, a distinction must be made between conventional mortgages on the one hand and F.H.A.-insured and V.A.-guaranteed mortgages on the other. With respect to conventional mortgages, any additional compensation to the lender would be considered usurious per se. However, in insured mortgages the insurance premium is paid to the government agency and not to the lender, and is, therefore, not considered to be interest under another name. But any charge over and above six percent, whether designated as a service charge or origination fee, which could be construed to be interest, would render such mortgage usurious under the laws of New York.

JOHN E. BRANDOW

Tainted Evidence—An Argument for Exclusion

Among the important issues of law in which a sharp division of judicial minds is found is that of the reception of evidence which has been illegally obtained. This division of opinion is clear when the federal rule is contrasted with the New York rule. The rule has long been established that evidence obtained in violation of the fourth amendment to the federal constitution, which guarantees the right of a person to be free from unreasonable searches by the federal government, will be excluded in a federal court.[1] Stated in general terms, the New York rule provides that evidence does not cease to become competent although obtained by unlawful means.[2]

The conflict arises from the need for the protection of individual rights and the correlative need for the protection of society. The reason for the exclusion of illegally obtained evidence was stated as early as 1765 by Lord Camden, who declared:

> "[I]t is very certain that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty would be both cruel and unjust; and it would seem, that search for evidence is disallowed upon the same principle."[3]

Nevertheless, this type of evidence was admissible at common law. It is suggested that the abuses arising from unlawful searches and seizures, prevalent in the prerevolutionary era, created the climate of opinion which led to the adoption of the fourth and fifth amendments to the United States Constitution. It is the federal courts' interpretation of the interplay of these two amendments which forms the basis of the federal rule.[4] In *Boyd v. United States*,[5] the United States Supreme Court found no substantial difference between the seizure of a man's private books and papers to be used in evidence against him and compelling him to be a witness against himself. The Court held that compulsory production of private books and papers was unwarranted and therefore inadmissible. This is the interpretation by the federal courts of the fourth and fifth amendments.

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[1] United States v. Jeffers, 342 U.S. 48 (1952); Weeks v. United States, 232 U.S. 383 (1913); see also RICHARDSON, EVIDENCE § 144 (8th ed. 1955).

[2] People v. Defore, 242 N.Y. 13, 150 N.E. 585 (1926).

[3] Entick v. Carrington, 19 How. State Tr., Col. 1029, 1073 (England 1765).

At the same time, it is important to note that although the due process clause of the fourteenth amendment protects against unreasonable search and seizure by state officials in violation of the fourth and fifth amendments, it is not applicable, and does not grant immunity against the use, in state courts, of evidence obtained by unlawful search and seizure.[6] The distinction between the New York decisions and those of the federal courts would appear to be based upon the interpretation of the word "unreasonable" in describing search and seizure. The federal courts hold as "unreasonable" that which is unlawful.[7] The New York courts base their conclusion on the premise that the issue is a procedural matter.[8]

Tracing the history of the New York rule, in the early case of *Ruloff v. People*,[9] the court of appeals upheld the reception of certain articles and papers found in the room of the defendant, although the evidence was seized some time after the arrest and without a warrant.[10] Perhaps the best known case in New York is *People v. Adams.*[11] There Judge Bartlett announced the rule as follows: ''Evidence which is pertinent to the issue is admissible, although it may have been procured in an irregular or even an illegal manner.''[12] Only two limitations were placed upon the rule: first, that the evidence be material, and second, that it be properly offered in evidence. The case of *People v. Chiagles*[13] limited the immunity against searches and seizures to those which were unreasonable in the light of common law traditions.

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[4] Davis v. United States, 328 U.S. 582 (1946).

[5] Boyd v. United States, 116 U.S. 616 (1885). The opinion reviews the common law and early statutory history of illegal search and seizure.

[6] Wolf v. Colorado, 338 U.S. 25 (1949); Olmstead v. United States, 277 U.S. 438 (1928); McGuire v. United States, 273 U.S. 95 (1927); People v. Defore, *supra* note 2.

[7] United States v. Jeffers, *supra* note 1.

[8] People v. Defore, *supra* note 2.

[9] 45 N.Y. 213 (1871).

The recent tendency of the New York courts has been to follow the established rule. In *People v. Richter's Jewelers, Inc.*[14] the court made reference to the older cases, noting the lack of any effort to change the rule during the 1938 Constitutional Convention, and drew the inference that no change was intended. The court found no reason to distinguish between contraband and articles innocently possessed. *Harlem Check Cashing Corp. v. Bell,*[15] in holding section 605 of the Federal Communications Act[16] inapplicable, upheld the admission of wiretapped evidence pursuant to a state court order in accordance with the state statute.[17] The rule has since been uniformly followed by the lower courts.[18] However, dissent from the rule was expressed by Justice Hofstadter in *Kennedy v. Marshall,*[19] an article 78 proceeding to compel the police department to return defendant's property, unlawfully seized and withheld despite defendant's acquittal. Although unnecessary to the decision, Justice Hofstadter's opinion presents a forceful argument for the adoption of the federal rule of exclusion of tainted evidence.

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[10] See also People v. Gardner, 144 N.Y. 119, 38 N.E. 1003 (1894); People v. Van Wormer, 175 N.Y. 188, 67 N.E. 299 (1903); People v. O'Connor, 257 N.Y. 473, 178 N.E. 762 (1931).

[11] 176 N.Y. 351, 68 N.E. 636 (1903), *aff'd sub nom.,* Adams v. New York, 192 U.S. 585 (1904).

[12] *Id.* at 357, 68 N.E. at 638.

[13] 237 N.Y. 193, 142 N.E. 583 (1923).

[14] 291 N.Y. 161, 51 N.E.2d 690 (1943); see also Harlem Check Cashing Corp. v. Bell, 296 N.Y. 15, 68 N.E.2d 854 (1946).

[15] *Supra* note 14.

[16] COMMUNICATION ACT OF 1934, § 605, 47 U.S.C. § 605.

[17] N.Y. CODE CRIM. PROC. § 813-a.

[18] See, *e.g.*, People v. Katz, 201 Misc. 414, 114 N.Y.S.2d 360 (Westchester County Ct. 1952); People v. Grants, 14 Misc.2d 182, 179 N.Y.S.2d 384 (N.Y.C. Ct. Gen. Sess. 1958). Compare People v. Broady, 5 N.Y.2d 500, 186 N.Y.S.2d 230, 158 N.E.2d 817 (1959).

As noted, the United States Supreme Court recognizes the right of state courts to admit evidence illegally obtained, where such courts do not regard the search or seizure as unreasonable. In the *Adams* case,[20] Justice Day said with regard to the fourth and fifth amendments, that there had been no violation of constitutional restrictions either in an unreasonable search or seizure, or in compelling the plaintiff in error to testify against himself, where illegally obtained evidence was admitted. He stated also:

> "[The] security intended to be guaranteed by the fourth amendment against wrongful search and seizures is designed to prevent violations of private security in person and property and unlawful invasion of the sanctity of the home of the citizen by officers of the law, acting under legislative or judicial sanction, and to give a remedy against such usurpations when attempted . . . [W]e think they [the fourth and fifth amendments] were never intended to have that effect, [*i.e.*, if in search for instruments of crime, other papers are taken, the same may not be given in evidence] but are rather designed to protect against compulsory testimony from a defendant against himself in a criminal trial and to punish wrongful invasion of the home of the citizen or the unwarranted seizure of his papers and property, and to render invalid legislation or judicial procedure having such effect."[21]

In the *Adams* case the evidence in question was seized not in an unwarranted and wrongful invasion of the home, but, rather, incidentally in the lawful execution of a warrant issued for another subject of search.

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[19] 17 Misc.2d 985, 181 N.Y.S.2d 413 (Sup. Ct. 1959).

[20] Adams v. New York, 192 U.S. 585, 594 (1904).

[21] *Id.* at 598.

In *Wolf v. Colorado*[22] the Court answered the precise question whether a conviction by a state court for a state offense denies due process of law required by the fourteenth amendment solely because evidence that was admitted at the trial was obtained under circumstances which would have rendered it inadmissible in a prosecution for violation of federal law in a United States court. Holding that due process was not violated, the Court pointed out that the exclusion rule was not an explicit requirement of the fourth amendment; that it was not based on legislation, but that it was only a matter of judicial interpretation.

That the federal courts should refuse to intervene in state criminal proceedings to suppress use of evidence, even when claimed to have been secured by unlawful search and seizure, has been specifically held in *Stefanelli v. Minard*.[23] In another case, evidence obtained by surreptitiously placing a microphone in the defendant's home was held to be properly admissible where federal statutes had no application.[24] Even the federal rule will permit illegally obtained evidence procured by private investigators without the knowledge of federal officers to be admitted in federal courts.[25] Although this appears to be the limit to which the rule will yield, the judiciary have made exceptions where reason and experience dictated. The Supreme Court was quick, however, to limit the state courts in *Rochin v. California*[26] where they held that evidence obtained by use of a stomach pump was inadmissible since it offended and outraged their "sense of justice." Thus, though California was among the states which admitted evidence illegally obtained, the Court held the evidence inadmissible. It seems that the rule of the *Rochin* case is a wise and obviously necessary limitation to place upon the rule of admissibility of "tainted" evidence.

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[22] *Supra* note 6.

[23] 342 U.S. 117 (1951).

[24] Irvine v. California, 347 U.S. 128 (1953).

[25] Burdeau v. McDowell, 256 U.S. 465 (1921).

[26] 342 U.S. 165 (1952).

The preponderance of judicial authority, therefore, sustains the admissibility of ''tainted'' evidence, where the state courts, of their own volition, have declared this to be the public policy of the state. The question is said to be one of policy.[27]

Giving meaning to the protection afforded by the fourth amendment, the Supreme Court, in *Weeks v. United States*,[28] restated the federal rule and held that such protection applied not only to unreasonable search and seizures, but also to the fruits thereof. In that case, federal authorities had cooperated with local police officials in an unlawful search and seizure. The defendant made a seasonable application for the return of the evidence, and the Supreme Court held that it was error to permit the use of such evidence upon the trial.[29] The exclusion extends to the fruits of the search as well as the evidence obtained. This is so because ''the essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all.''[30]

The federal rule was again stated, in *Agnello v. United States*[31] as follows: ''When properly invoked, the fifth amendment protects every person from incrimination by the use of evidence obtained through search or seizure made in violation of his rights under the fourth amendment.''[32] The Court, however, imposed the restriction that the accused must proceed before trial for a return of the articles, or for the suppression of the evidence, where he has knowledge that they are in the possession of the law enforcement agency. As a second remedy, the defendant, upon a proper showing, may renew the objection to the admission of such evidence where the pre-trial motion has been denied.[33] Of course, where the defendant had no knowledge of the possession by the law enforcement officials of illegally obtained evidence until its introduction, he may then properly object.[34] The case of *Gouled v. United States*,[35] following the rule, held that it made no difference whether the search was made by stealth or force and coercion. In *Amos v. United States*,[36] the prohibition of the amendment was stated to be against *all* "unreasonable searches and seizures." Therein, the Court admitted evidence which was seized under a warrant, but used in the prosecution of a crime other than that which was described in the warrant. The Court warned against "fishing expeditions," holding that a rule of practice must not be allowed for any technical reason to prevail over a constitutional right.[37]

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[27] Nardone v. United States, 302 U.S. 379, 383 (1937).

[28] 232 U.S. 383 (1914).

[29] *Id.* at 398.

[30] Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

[31] 269 U.S. 20 (1925).

[32] *Id.* at 33.

The prohibition era was a fruitful time for the expansion of the law on this subject. Among the cases which arose at that time was *Taylor v. United States*,[38] where a conviction was reversed for the failure of the trial court to suppress evidence which was unlawfully obtained. Even though the federal agents had adequate grounds to believe that the illegal acts were being committed, the fruits of their unlawful conduct were suppressed. The Court reasoned that since the agents reached their conclusion by continued surveillance, they had had ample time in which to obtain a warrant. Doubtless the same reasoning would apply in the great majority of cases.

So zealously do the federal courts guard the right of a citizen to freedom from illegal actions perpetrated by federal officials that the Supreme Court enjoined a federal narcotics agent from testifying in a state criminal case with respect to evidence unlawfully seized by him.[39] This case would appear to be substantial indication of the determination of the federal courts to prevent the use of "tainted" evidence. It is clear that the federal courts will acknowledge that the guilty will sometimes escape where evidence is excluded because it was illegally obtained. Their zeal in adhering to the rule indicates their intent to give full meaning and vitality to the protection thus offered to the innocent.

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[33] Agnello v. United States, *supra* note 31.

[34] Gouled v. United States, 255 U.S. 298 (1921).

[35] *Ibid.*

[36] Amos v. United States, 255 U.S. 313 (1921).

[37] *Ibid.*

[38] 286 U.S. 1 (1931).

The more recent development of electronic devices and their adaptation to crime detection gave rise to a series of cases known as "wire-tapping" cases. The Supreme Court, in *Olmstead v. United States*,[40] sharply divided in the early approach to the issue, and held that wire-tapped evidence was not obtained by unlawful search and seizure, since the wires and the activities were outside the home. Justice Holmes, writing for the minority, declared, "We are free to choose between two principles of policy. But if we are to confine ourselves to precedent and logic the reason for excluding evidence obtained by violating the Constitution seems to me logically to lead to excluding evidence obtained by a crime of an officer of the law." However, the *Olmstead* decision remained the law until Congress enacted section 605 of the Federal Communications Act, in 1934,[41] which in effect made unauthorized wire-tapping unlawful. When first before the Supreme Court, the case of *Nardone v. United States*,[42] denied admission to evidence obtained through unlawful wire-tapping, and declared the methods to be "inconsistent with ethical standards and destructive of personal liberty."[43] In the second *Nardone* decision,[44] evidence procured through the use of knowledge gained through unlawful wire-tapping was held to be inadmissible.

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[39] Rea v. United States, 350 U.S. 214 (1956).

[40] *Supra* note 6, at 471.

[41] *Supra* note 16.

[42] *Supra* note 27.

[43] Nardone v. United States, *supra* note 27, at 383.

[44] 308 U.S. 338 (1939).

The later case of *Weiss v. United States*[45] is important in respect to two evidentiary rules. The Court held, first, that the prohibition of the statute applies not only to interstate telephone communications, but to intrastate conversations as well, and second, that a defendant who had turned state's evidence should not be permitted to read transcripts or to identify them when offered in evidence where they were procured through unlawful wire-tap methods. In *Miller v. United States*,[46] federal agents, acting without a warrant, forcibly entered an apartment to make an arrest. Since they had done so without properly stating their purpose and authority, the ensuing arrest was held to be unlawful, and the evidence seized, which was marked money, was held to be inadmissible.

While it is true that the exclusionary rule is not an essential ingredient of the rights of security guaranteed by the fourth amendment, it is a substantial means of enforcing those rights. Indeed it is the most direct and effective method of protecting the innocent. One state court has said: other remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers with the result that the courts have been constantly required to participate in and, in effect, condone, the lawless activities of law enforcement officers.[47]

The use of tainted evidence is repugnant to the public sense of morality and justice and, to an extent, undermines respect for the law which is the keystone of all law enforcement. As was said by Mr. Justice Brandeis, dissenting in *Olmstead v. United States*,[48] "if the government becomes a lawbreaker, it breeds contempt for law." While the New York rule is sought to be justified on the basis that a contrary public policy has not been declared, it would seem clear that public resistance to unfair tactics on the part of governmental officials would mandate a reversal of the rule. This is especially so since the rule is concededly one of judicial policy and not the result of legislative fiat. "Out of regard for its own dignity as an agency of justice and custodian of liberty the Court should not have a hand in such 'dirty business'."[49]

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[45] 308 U.S. 321 (1939).

[46] 357 U.S. 301 (1958).

[47] People v. Cahan, 282 P.2d 905 (Cal. 1955). See also an extensive annotation in 50 A.L.R.2d 531, which states that 21 states now, including California, have adopted the federal rule; two states have done so by statute, and in 27 states, including New York, the common law rule exists.

[48] 277 U.S. 438, 485 (1928).

Moreover, it lies within the power of the court to effectuate the change. The court "has not only the right, but also the duty, to re-examine a question where justice demands it."[50] Quoting Chancellor Kent, the court of appeals has said, "decisions which seem contrary to reason, 'ought to be examined without fear and revised without reluctance, rather than to have the character of our law impaired, and the beauty and harmony of the system destroyed by perpetuity of error'."[51]

Our freedoms can be lost by the process of erosion if the incursion is based upon the theory that the end justifies the means. Freedom can be enjoyed only when the extent thereof and the right thereto is fully understood by our citizens and guaranteed by our law. It seems clear that the inconsistency with which our citizens are confronted by the contrast of the federal rule *vis-a-vis* the state rule promotes a degree of confusion and uncertainty which should not be tolerated in an ordered democratic society. We cannot expect the citizens to escape confusion in the face of the inconsistent rulings of parallel judicial systems which were created for their protection. It is the purpose of our courts to resolve and not to compound confusion in the area of legal rights.

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[49] People v. Cahan, *supra* note 47, at 912.

[50] Desmond, J., in Woods v. Lancet, 303 N.Y. 349, 354, 102 N.E.2d 691, 694 (1951); see also Bing v. Thunig, 2 N.Y.2d 656, 163 N.Y.S.2d 3, 143 N.E.2d 3 (1957).

[51] Woods v. Lancet, *supra* note 50, at 355, 102 N.E.2d at 694.

It will not suffice to assume in normal times that the inconsistency is harmless, for history demonstrates that in times of crisis the public clamors for drastic remedies without regard to the consequences. So when crime is supposedly rampant, popular opinion will demand the conviction of all persons charged with crime, irrespective of the methods used. Police and law enforcement officers, goaded by the clamor and affected by the emotionalism of the moment, are likely to ride rough-shod over the rights of innocent people. When the crisis passes, sympathy is found to be no balm for the injuries and indignities suffered by those whose rights have been infringed. The scars remain. The rights of our citizens are diminished. The opportunity of the court of appeals to vindicate its traditional leadership is clear.

Too often in the review of reported cases and legal commentaries the question appears to have been raised only by persons of evil repute and those whose conduct would appear to justify the imposition of a penalty. However, this is obviously not an end of the matter, and it is unnecessary to belabor the point that the full protection of the laws should be available to all without regard to reputation or the nature of the charge. It is highly probable that there are frequent unlawful intrusions by police officials into the homes of many citizens who are above justifiable suspicion. Of such cases, however, there is no report since the police officials dismiss the citizen when they are unable to secure evidence of criminal activities. Nor, for various personal reasons, do such innocent victims usually resort to civil remedies. It is reasonable to assume therefore that much unlawful activity of the police in this regard goes unnoticed and unchecked.

The reason for denying admission to "tainted" evidence has been cogently stated as follows:

> Exclusion is the only practical way of enforcing the constitutional privilege. . . . Only in case the prosecution which itself controls the seizing officials, knows that it

> cannot profit by their wrong, will that wrong be repressed.[52]

No longer can the unlawful action be excused as that of a "blundering constable."[53] Modern methods of crime detection have so far advanced as to render unnecessary the impatient and indolent action of unreasonable and unwarranted search and seizure by police officials. The sanctity of the home should not be so tenuous as to depend upon the judgment and discretion of a "blundering constable."

JAMES E. CONWAY

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[52] L. Hand, J., in United States v. Pugliese, 153 F.2d 497, 499 (2d Cir. 1945).

[53] Cardozo, J., People v. Defore, *supra* note 2, at 21.

The Doctrine of Public Policy as Applied to Injury Resulting from Negligence in the Absence of Immediate Physical Injury

The Problem Presented

In 1916, an Alabama court,[1] discussing the limits which should be placed upon the judicial use of public policy, asserted:

> The doctrine of expediency or public policy . . . is a doctrine that should be very sparingly and cautiously employed, for if a person's rights have been unlawfully invaded, it would ill become a court of justice to withhold its remedy on the ground of expediency.[2]

In the light of this statement, it is the purpose of this comment to analyse those principles of public policy which presently exist as a justification for the well known rule of law announced by the New York Court of Appeals in the leading case of *Mitchell v. Rochester Ry. Co.*[3] Although the general rule of damages applicable to an action brought for negligence in New York is that a wrongdoer is responsible for the natural and proximate consequences of his conduct, and what are such consequences must be left for the determination of the jury,[4] the *Mitchell* case held that no recovery would be allowed for physical injuries [5] sustained by fright occasioned by the negligence of another in the absence of an immediate personal injury.[6]

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[1] Alabama Fuel & Iron Co. v. Baladoni, 15 Ala. App. 316, 73 So. 205 (1916).

[2] *Id.* at 321–322, 73 So. at 207.

[3] 151 N.Y. 107, 45 N.E. 354 (1896). Plaintiff, a pregnant woman, was standing on a cross-walk waiting to go aboard the defendant's horse car. An employee of the defendant so negligently drove his horses that when they were finally halted, plaintiff was standing between the horses' heads. Although plaintiff had not been touched by the horses, she became extremely frightened and shortly afterward suffered a miscarriage.

[4] See generally, Ehrgott v. Mayor, 96 N.Y. 264, 282 (1884).

In the sixty-four years since this rule was first expounded in New York,[7] the clear majority of American courts have refused to adopt its application within their own jurisdictions.[8] With unanimous opinion,[9] numerous legal scholars [10] have aligned themselves in opposition to the result of the *Mitchell* case, and in addition, the American Law Institute has adopted the same point of view.[11] In an effort to avoid the harsh results reached in denying a recovery for the physical effects of fright in all cases, the New York courts themselves have developed many inroads into this rule,[12] and recently, the New York Court of Claims has reached two decisions [13] by refusing to apply the rule. Despite this opposition, however, an earlier attempt to abolish the *Mitchell* rule by statute failed to find necessary support in the New York legislature.[14]

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[5] Due to the interrelationship of the physical organism with the emotional or mental, any discussion of the right to recover damages for physical injuries resulting from fright is complicated by a difficult semantic problem, because it may be demonstrated scientifically that every emotional disturbance has some effect upon the physical system. See generally, Goodrich, *Emotional Disturbance As Legal Damage,* 20 MICH. L. REV. 497 (1922); Smith and Solomon, *Traumatic Neuroses In Court,* 30 VA. L. REV. 87 (1943); Smith, *Relation of Emotions to Injury and Disease,* 30 VA. L. REV. 193 (1944); McNiece, *Psychic Injury and Tort Liability in New York,* 24 ST. JOHN'S L. REV. 1 (1949).

[6] Mitchell v. Rochester Ry. Co., 151 N.Y. 107, 110, 45 N.E. 354, 355 (1896).

[7] The oldest case dealing directly with the problem in New York is Lehman v. Brooklyn City R.R. Co., 47 Hun. 355 (Gen. Term 2d Dep't 1888). There, in affirming a dismissal of the plaintiff's complaint, the court stated: "We have been unable to find either principle or authority for the maintenance of this action and we have been referred to none by the counsel." Lehman v. Brooklyn City R.R. Co., *supra* at 356.

[8] Of those states taking a stand on this issue, twenty-four states allow a recovery and fourteen states are opposed to a recovery. For the alignment of American jurisdictions see ANNOT., 64 A.L.R. 2d 100, 134, 143 (1959).

[9] Hallen, *Damages for Physical Injuries Resulting From Fright or Shock,* 19 VA. L. REV. 253, 254 (1933).

[10] No exhaustive collection of authorities is attempted. Some of the leading articles on the subject are: Bohlen, *Right to Recover for Injury Resulting From Negligence Without Impact,* 50 U. PA. L. REV. 141 (1902); Throckmorton, *Damages For Fright,* 34 HARV. L. REV. 260 (1921); Goodrich, *Emotional Disturbance As Legal Damage,* 20 MICH. L. REV. 497 (1922); Wilson, *The New York Rule as To Nervous Shock,* 11 CORNELL L.Q. 512 (1926); Hallen, *Damages for Physical Injuries Resulting from Fright or Shock,* 19 VA. L. REV. 253 (1933); Magruder, *Mental and Emotional Disturbances in the Law of Torts,* 49 HARV. L. REV. 1033 (1936); Smith, *Relation of Emotions to Injury and Disease,* 30 VA. L. REV. 193 (1944); McNiece, *Psychic Injury and Tort Lia-*

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bility in New York, 24 ST. JOHN'S L. REV. 1 (1949); Campbell, *Injury Without Impact*, [1951] INS. L.J. 654.

[11] RESTATEMENT, TORTS § 436, illustration 3 (1934), presents the facts of Mitchell v. Rochester Ry. Co., *supra* note 6, and suggests a recovery in this situation.

[12] The major exceptions to the rule denying recovery are: First, a recovery is allowed where the fright is willfully caused. See, *e.g.*, Preiser v. Weilant, 48 App. Div. 569, 62 N.Y. Supp. 890 (2nd Dep't 1900); Garrison v. Sun Publishing Co., 207 N.Y. 1, 100 N.E. 430 (1912); Beck v. Libraro, 220 App. Div. 547, 221 N.Y. Supp. 737 (2d Dep't 1927). Second, a recovery is allowed where the fright operates externally and produces an immediate physical injury. See, *e.g.*, Twomley v. Central Park. N. & E.R.R.R., 69 N.Y. 158 (1877); Cohn v. Ansonia Realty Co., 162 App. Div. 791, 148 N.Y. Supp. 39 (1st Dep't 1914); Mundy v. Levy Bros. Realty Co., 184 App. Div. 467, 170 N.Y. Supp. 994 (2d Dep't 1918). Third, a recovery is allowed for bodily injuries resulting from fright accompanied by a battery or other physical violence. See, *e.g.*, Comstock v. Wilson, 257 N.Y. 231, 177 N.E. 431 (1931). Jones v. Brooklyn Heights R.R. Co., 23 App. Div. 141, 48 N.Y. Supp. 914 (2d Dep't 1897); Carroll v. N.Y. Pie Baking Co., 215 App. Div. 240, 213 N.Y. Supp. 553 (2d Dep't 1926).

[13] Williams v. State, 204 Misc. 843, 126 N.Y.S. 2d 324 (Ct. Cl. 1953), *aff'd mem.*, 284 App. Div. 1027, 134 N.Y.S. 2d 857 (3d Dep't 1954), *rev'd on other grounds*, 308 N.Y. 548, 127 N.E. 2d 545 (1955); Battalla v. State, 17 Misc. 2d 548, 184 N.Y.S. 2d 1016 (Ct. Cl. 1959), *appeal docketed*, No. 21, 3d Dep't, November 13, 1959.

[14] The New York Law Revision Commission proposed legislation that would have overruled the decision of Mitchell v. Rochester Ry. Co., 151 N.Y. 107, 45 N.E. 354 (1896) by a proposed amendment to section 37-a of the Laws of 1909, ch. 27 [The General Construction Law] by adding the following sub-division: "Action to recover for injuries resulting from fright or shock. In an action to recover damages for bodily injury

What sound reasons exist for this exception to the general rule of law that bodily injuries caused by the negligent conduct of another constitute the basis of recovery in a tort action? In reaching its decision in the *Mitchell* case, the New York Court of Appeals gave three basic reasons for denying the right to recover damages for negligently caused physical injuries resulting from fright, in the absence of an immediate physical injury.[15] The court first assumed that since fright could not form the basis of an action, it was obvious that no recovery could be had for its physical consequences.[16] Next, the court reasoned that a physical injury which resulted from fright did not fall within the rule as to proximate cause.[17] Finally, the court relied upon the doctrine of public policy as a further justification for its decision. In elaborating upon this proposition, the court asserted:

> If the right of recovery in this class of cases should be once established, it would naturally result in a flood of litigation in cases where the injury complained of may be easily feigned without detection, and where the damages must rest upon mere conjecture or speculation. The difficulty which often exists in cases of alleged physical injury, in determining whether they exist, and if so, whether they were caused by the negligent act of the defendant, would not only be greatly increased, but a wide field would be opened for fictitious or speculative claims. To establish such a doctrine would be contrary to principles of public policy.[18]

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or wrongful death hereafter caused, recovery shall not be denied merely because such bodily injury or wrongful death was brought about through fright or shock without physical contact or impact." The bill was lost and tabled in the senate and was not reported out of committee in the assembly. See N.Y. LAW REVISION COMMISSION, STUDY RELATING TO LIABILITY FOR INJURIES RESULTING FROM FRIGHT OR SHOCK, Leg. Doc. (1936) N. 65(E), 1936 Report, Recommendations and Studies 375 (hereinafter cited as New York Study.)

[15] Mitchell v. Rochester Ry. Co., 151 N.Y. 107, 109–110, 45 N.E. 354, 355 (1896).

[16] *Id.* at 109, 45 N.E. at 354.

[17] *Id.* at 110, 45 N.E. at 355.

[18] *Id.* at 110, 45 N.E. at 354.

The fallacies existing in the first two reasons given by the court as grounds for denying a recovery in the *Mitchell* case would seem clearly exposed in many articles upon this subject by eminent legal scholars who demonstrate that the court's reasoning is insupportable both in law and in logic.[19] Dean Prosser, in his hornbook on torts,[20] has stated that the objections to allowing a recovery have been "abolished so many times, and it is threshing old straw to deal with them."[21] The court of appeals itself, in deciding the later case of *Comstock v. Wilson*,[22] apparently repudiated as unsound all the reasons given by the court in reaching the *Mitchell* decision except those based on public policy.[23] In light of the general theory upon which the common law is based—that the law provides a remedy for every wrong[24]—what follows is an analysis of those principles of public policy which evidently are so strongly grounded on the consideration of the public welfare as to permit the continued existence of the *Mitchell* rule in New York, notwithstanding the opposition to its application.

The Perpetration of Fraud Argument

One of the major public policy arguments advanced by the court of appeals in deciding the *Mitchell* case was the assertion that if recoveries in this type of negligence action were to be permitted, it would lead to the successful prosecution of fraudulent claims.[25] In theory, this contention may be asserted in favor of disallowing all actions based on negligence, and necessarily implies a certain degree of distrust in the capacity of our courts, lawyers and juries to determine the truth in this class of claims.[26]

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[19] See articles cited *supra* note 10.

[20] PROSSER, TORTS (2d ed. 1955).

[21] Prosser, *op. cit. supra* note 20, at 176.

[22] 257 N.Y. 231, 177 N.E. 431 (1931).

[23] Bohlen & Polikoff, *Liability In New York for the Physical Consequences of Emotional Disturbance*, 32 COLUM. L. REV. 409, 417 (1932).

[24] Professor Throckmorton in his article, *Damages for Fright*, 34 HARV. L. REV. 260 (1921), has advanced the view that: "In any discussion of the denial of a right of action on the ground of public policy, it must be born in mind that the general theory upon which the common law is based is that there is remedy for every wrong, and in any case in which A is shown to have committed a wrongful act as a proximate result of which B has suffered damage, there is a very strong presumption in favor of a right of action by B against A." Throckmorton, *supra* at 274.

Undoubtedly, the courts in jurisdictions which do allow a recovery for negligently caused physical injuries flowing from fright, occasioned without immediate physical contact,[27] recognize the fact that the institution and maintenance of fraudulent claims will occur, to some degree, in this type of litigation.[28] However, these courts have not allowed this fear to hinder them in the application of what they consider to be the more sound point of view.[29] A typical reaction to the public policy argument employed by the New York court is found in the following simple statement by the New Hampshire court:[30] "To hold that all honest claims should be barred merely because otherwise some dishonest ones will prevail, is not enough to make out a case of public policy. . . ."[31] Similarly, the Maryland court[32] in discussing the same problem said: "The argument from mere expediency cannot commend itself to a court of justice resulting in the denial of a logical legal right and remedy in all cases because in some a fictitious injury may be urged as a real one."[33]

In 1925, a lower court in New York, in *Sider v. Reid Ice Cream Co.*,[34] announced that the perpetration of fraud argument advanced in the *Mitchell* case could no longer be supported in view of the great changes that had taken place in the prevailing conditions which existed when the rule was first announced.[35] The decision in the *Sider* case raises a question whether modern developments in New York have created such changes in our living conditions as to require no longer this doctrine of expediency? No doubt, the twentieth century has brought about a staggering number of scientific developments all of which have caused complex changes in the social conditions which existed at the time the *Mitchell* case arose. It has only been more recently, however, with the advent of large urban centers and the modern automobile, that the volume of negligence litigation has taken on its present proportions.[36] Today, our legal tribunals are faced with problems created by negligence litigation which far exceed those existing during the period when the *Mitchell* decision was reached. It has been asserted that whatever justification there may be for the present rule "rests in the courts' fear that unscrupulous lawyers with the aid of equally unscrupulous doctors may obtain from sympathetic juries verdicts upon purely fabricated evidence."[37] Since the ever-present problem of "'ambulance chasing' with its concomitant evil of fabricated claims"[38] more readily occurs in large urban areas, some merit may exist in a contention that fear of successful prosecution of fraudulent claims constitutes a valid ground of public policy in New York State, while it might not justify a denial of recovery in other states.[39]

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[25] Mitchell v. Rochester Ry. Co., 151 N.Y. 107, 110, 45 N.E. 354 (1896).

[26] See Dulieu v. White & Sons, [1901] 2 K.B. 669, 681.

[27] For the present alignment of states allowing a recovery, see *supra* note 8.

[28] NEW YORK STUDY, *supra* note 14, at 421.

[29] McNiece, *Psychic Injury and Tort Liability in New York*, 24 ST. JOHN'S L. REV. 1, 30 (1949).

[30] Chiuchiolo v. New England Wholesale Tailors, 84 N.H. 329, 150 Atl. 540 (1930).

[31] *Id.* at 335, 150 Atl. at 543.

[32] Green v. Shoemaker, 111 Md. 69, 73 Atl. 688 (1909).

[33] *Id.* at 89, 73 Atl. at 692.

[34] 125 Misc. 835, 211 N.Y. Supp. 582 (2d Dep't App. Term 1925).

However, in view of the numerous exceptions engrafted upon the *Mitchell* rule by the New York courts,[40] particularly the contemporaneous-impact exception,[41] the validity of any arguments in favor of the continued existence of the *Mitchell* rule in New York based on the possibility of fraudulent claims seems doubtful.[42] It has been asserted that the impact exception, instead of guaranteeing the bona fides of a claim, ''breeds dishonest attempts to mold the facts so as to fit them within the grooves leading to a recovery.''[43] It is without question that a disreputable person who wishes to falsify a claim to avoid the rule of the *Mitchell* case may by the commission of perjury prove a slight impact as easily as no impact.[44] As the rule presently operates in New York, indiscriminate denial of liability in cases where there is an absence of proof of immediate personal injury seems to work a severe hardship for any litigant who refuses to fabricate his claim and affords no protection from the disreputable person willing to commit perjury.

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[35] *Id.* at 836, 211 N.Y. Supp. at 583.

[36] NEW YORK STUDY, *supra* note 14, at 419.

[37] Bohlen, *Fifty Years of Torts,* 50 HARV. L. REV. 725, 733 (1937).

[38] McNiece, *supra* note 29, at 32.

[39] It has been pointed out that all American jurisdictions having a population in excess of one million, with the exception of California, allow recovery for physical injuries caused by fright where the latter is occasioned by a slight battery. McNiece, *supra* note 29, at 32.

[40] For the major exceptions to this rule see *supra* note 12.

The Increased Litigation Argument

The second principle of public policy assigned by the court of appeals as a justification for its decision in the *Mitchell* case was that a recovery in this class of negligence actions would naturally result in a flood of litigation.[45] This reasoning is based on a proposition closely related to the perpetration of fraud argument—that for every genuine claim our courts would have to cope with a tremendous number of illusory actions. The Pennsylvania court, in the recent case of *Bosley v. Andrews,*[46] denied a recovery for a physical injury allegedly suffered from fright, occasioned without a contemporaneous impact, on this practical ground of public policy which it considered to be valid. In the *Bosley* case, however, the court supported its position on more realistic reasons. In advancing the theory, the court asserted that there are numerous everyday events which are negligently caused, and reasoned that if they were to become compensable they would allow normal as well as nervous or mentally disturbed people to institute countless actions upon the honest belief that their physical injuries were produced by a state of fright suffered from the common place occurrence. In visualizing what might occur if recovery were to be allowed, the court said:

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[41] In speaking of the validity of the rule of law adopted in Mitchell v. Rochester Ry. Co., 151 N.Y. 107, 45 N.E. 354 (1896), in view of the impact exception thereto, Professor Throckmorton asserted that "A rule of liability so highly technical, so completely without foundation in reason, is not out of place in a primitive system of jurisprudence, but it is unworthy of any system based on the theory of granting redress for every substantial wrong." Throckmorton, *supra* note 24, at 278.

[42] NEW YORK STUDY, *supra* note 14, at 450.

[43] *Ibid.*

[44] McNiece, *supra* note 29, at 32.

[45] 151 N.Y. 107, 110, 45 N.E. 354 (1896).

[46] 393 Pa. 161, 142 A.2d 263 (1958).

> To allow recovery for fright, fear, nervous shock, humiliation, mental or emotional distress—with all the disturbances and illnesses which accompany or result therefrom—where there has been no physical injury or impact, would open a Pandora's box. A plaintiff might be driving her car . . . when a sudden or unexpected or exceptionally loud noise of an automobile horn behind her . . . or a sudden loud and unexpected fire engine bell or siren . . . or an unexpected nerve-wracking noise produced by riveting on a street . . . [could] cause or aggravate fright or nervous shock . . . with subsequent emotional distress or suffering or pain or miscarriage or heart attack, or some kind of disease.[47]

On the other hand, if a wrongdoer negligently commits a wrongful act which frightens a person to such an extent that physical injuries are the proximate result thereof, should the New York courts deny distress, in the absence of a contemporaneous physical injury, merely because an increase in litigation would result from allowing a remedy? The answer to this question has been clearly given in the negative.[48] Professor Throckmorton [49] found no justification for the *Mitchell* rule on this ground of public policy, and further, he advanced the view that "public policy does not forbid increased litigation for the redress of wrongs."[50] Dean Prosser[51] has also disapproved this public policy argument by asserting: "It is the business of the law to remedy wrongs that deserve it, even at the expense of a 'flood of litigation'; and it is a pitiful confession of incompetence on the part of any court of justice to deny relief upon the ground that it will give the court too much work to do."[52]

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[47] *Id.* at 168–169, 142 A.2d 266–267.

[48] See authorities cited note 10 *supra*.

[49] Throckmorton, *supra* note 24.

In a further refutation of the public policy argument based on the probability of increased litigation, the position may be taken that if the New York Court of Appeals were to allow a recovery for physical injuries resulting from fright in the absence of an immediate personal injury, there is no real reason to believe that our court calendars would become further congested.[53] In the states allowing a recovery in this situation,[54] there is a complete lack of evidence that the feared flood of litigation has made its appearance.[55] In fact, contrary to what might be expected, the volume of litigation has been largest in those states denying a recovery.[56] No doubt, our courts should concern themselves with the prevention of vexatious litigation; however, they should be equally concerned with providing a means of legal redress in meritorious cases.[57]

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[50] *Id.* at 275.

[51] Prosser, *Intentional Infliction of Mental Suffering: A New Tort,* 37 MICH. L. REV. 874 (1939).

[52] *Id.* at 877.

[53] NEW YORK STUDY, *supra* note 14, at 421.

[54] For present alignment of states allowing recovery in this situation, see *supra* note 8.

[55] In Gulf C. & S. F. Ry. Co. v. Hayter, 93 Tex. 239, 242, 54 S. W. 944, 945 (1900), the court in discussing the amount of litigation which arose in allowing recoveries for injuries resulting from fright, stated: ". . . the reported cases would indicate that the litigation arising from injuries inflicted through a mental shock are not so numerous as to cause any considerable increase of litigation; so that this objection, as it seems to us, rests upon an imaginary ground."

[56] McNiece, *supra* note 29, at 31.

[57] Throckmorton, *supra* note 24, at 275.

Where physical injuries suffered at the hands of a negligent wrongdoer are the proximate result of fright, the apparently unfounded fear[58] that the allowance of a remedy will increase litigation should not be invoked by our courts to disallow redress in every situation.

The Argument That Damages Are Difficult to Prove and Measure

The final public policy argument employed by the court in deciding the *Mitchell* case was that if a recovery were allowed, the damages received must necessarily rest on mere conjecture or speculation.[59] In asserting this proposition, the court was not under the impression that all physical injuries sustained from fright are of an imaginary character, or that the sufferings described by litigants are unreal.[60] The court's viewpoint proceeded on the theory that scientific knowledge of the effects of fright upon the body is so imperfect, that any evidence pertaining to it must be speculative and conjectural, and, therefore, it would be just and more expedient to refuse a remedy in this situation.[61] The basic doubt manifested by the court was of the ability to trace by competent medical evidence the chain of causation from the occurrence of the negligent act causing the fright to the ultimate physical injury when there is no immediate personal contact.[62]

The advancement of this contention presents primarily a problem of a medico-legal nature.[63] In recent times, medical knowledge in the realm of physical injuries resulting from emotional disturbances has increased to such an extent as to be directly opposed to the court's viewpoint in the *Mitchell* case.[64] However, of even greater importance is the fact that many situations in the law present just as difficult a problem of proof and measurement of damages, and yet a denial of recovery is not made on the grounds of public policy.[65] Actually, the problem of damages in this area is a matter involving the proof of each individual case, and it is considered to be addressed to the honesty of purpose and good sense of our juries.[66] If the *Mitchell* case were to be overruled, the ability of our trial courts to satisfactorily deal with the problem of ascertaining damages in fright cases has been acknowledged.[67] It has been further asserted along this line,

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[58] *Ibid.*

[59] 151 N.Y. 107, 110, 45 N.E. 354 (1896).

[60] See Comstock v. Wilson, 257 N.Y. 231, 235, 177 N.E. 431, 433 (1931).

[61] Smith, *Relation of Emotions to Injury and Disease*, 30 VA. L. REV. 193, 198 (1944).

[62] 151 N.Y. 107, 110, 45 N.E. 354, 355 (1896). For a discussion of this proposition see Burdick, *Tort Liability for Mental Disturbance and Nervous Shock,* 5 COLUM. L. REV. 179, 186 (1905).

[63] McNiece, *supra* note 29, at 68.

> . . . [A] distinction might properly be drawn between those effects of fright or shock which the common experience of the ordinary man recognizes as likely to result therefrom . . . and those obscure nervous disorders as to which even medical experts may and do disagree. If trial courts could and would exercise an intelligent control over jury trials such a differentiation might be possible.[68]

In view of the fact that the New York courts do allow a recovery for physical injuries flowing from fright when the factual pattern of a case allows it to fall within one of the exceptions to the *Mitchell* rule,[69] it is difficult to justify the position taken in the *Mitchell* case, on the ground of public policy, that the absence of an immediate physical injury makes damages so much harder to prove and measure that a remedy must be disallowed in all cases.[70]

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[64] Goodrich, *Emotional Disturbance as Legal Damage*, 20 MICH. L. REV. 497 (1922); Earengy, *The Legal Consequence of Shock,* 2 MEDICO-LEG. & CRIM. RECORD 14 (1934); Smith and Solomon, *Traumatic Neuroses In Court*, 30 VA. L. REV. 87 (1943); Smith, *Relation of Emotions To Injury and Disease,* 30 VA. L. REV. 193 (1944). *But see* Note, 15 U. CHI. L. REV. 188 (1947), calling attention to the fact that the "customary miscarriage" cannot result merely from emotional disturbance.

[65] NEW YORK STUDY, *supra* note 14, at 422.

[66] Alabama Fuel & Iron Co. v. Baladoni, 15 Ala. App. 316, 321, 73 So. 205, 207 (1916).

[67] Bohlen and Palikoff, *supra* note 23, at 417.

[68] *Ibid.*

[69] See exceptions to Mitchell v. Rochester Ry. Co., *supra* note 41, cited in note 12, *supra.*

Conclusion

Consideration of the major principles of public policy advanced by the court as reason for the *Mitchell* decision leads to the conclusion that the real answer to the public policy argument is not an indiscriminate denial of a legal remedy in every case. If proper results in this area are to be achieved, the answer to the problem posed may be found in judicial recognition of modern scientific developments in the physiological-psychological area,[71] and in the proper use of qualified medical experts in our trial courts.[72] With such help juries could reach a just, sound conclusion within the circumstance of each individual case.

RONALD P. DEANGELUS

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[70] Throckmorton, *supra* note 24, at 277.

[71] Jones, *Fright*, 289 INS. L.J. 99, 101 (1947). See generally, articles cited *supra* note 64.

[72] McNiece, *supra* note 29, at 76.

Recent Decisions

AUTOMOBILES — NEGLIGENCE — PROHIBITION AGAINST PASSENGERS AS AFFECTING OWNER'S LIABILITY

The court of appeals, in the recent case of *Burmaster v. State*, 7 N.Y.2d 65, 195 N.Y.S.2d 385, 163 N.E.2d 742 (1959), held that where a state-owned automobile is being used on state business and a passenger is present to assist in the performance of such business, the state will be liable for an injury to the passenger due to the negligence of the driver, in the absence of an express prohibition against passengers. The court also held that the presumption of owner's consent to the operation, created by section 59 of the New York Vehicle and Traffic Law, renders unnecessary actual knowledge by the owner of the injured person's presence in the automobile.

The claimant was injured while a passenger in an automobile owned by the state and driven by her husband, a state game protector. Her husband, sixty-nine years of age, requested her to accompany him on a 130-mile trip on state business, in order that if he became tired she might relieve him in driving. Five years before the accident, district game protectors had been instructed by a memorandum to discontinue carrying members of their families in state-owned automobiles to or from their respective places of business and for other purposes not strictly in line with the performance of their official duties. The memorandum stated that the game protectors would be allowed to take others along, if their presence was related to the work to be performed. After an accident due to her husband's alleged negligence, the claimant sued the state for her injuries.

The court of claims held that although the husband was negligent, the statutory presumption of the owner's consent to the operation of the vehicle was rebutted by virtue of the fact that the state had forbidden the game protector to transport his wife as a passenger in a state-owned vehicle. The appellate division reversed the finding of the court of claims, holding that the directive did not prohibit the presence of the claimant in the car since the weight of evidence indicated she was there in furtherance of the state's business. The court concluded that the car was being driven with the state's permission and therefore the state was liable to the claimant. *Burmaster v. State*, 7 App. Div.2d 775, 179 N.Y.S.2d 980 (1958).

The court of appeals, in affirming the appellate division, decided that, under the circumstances, it was not an unreasonable precaution to take his wife along on a 130-mile trip. The weight of evidence was deemed to indicate that the claimant was with her husband to assist him if necessary in the operation of the automobile, so that she was in reality a person who was involved in the work to be performed during the use of the automobile. Thus the claimant was held not to have violated the state's memorandum by taking his wife as a passenger. The court held that, where the automobile is being used on state business and the passenger is present to assist in the performance of such business, the state will be liable for the negligence of the driver.

The dissenting opinion contended that the proof established the fact that the car was being used for private purposes which the driver knew were contrary to the departmental memorandum. It was further asserted in the dissent that there was no proof that the state had actual or implied knowledge of the claimant's presence in the automobile and under such circumstances the negligence of the driver could not be imputed to the state.

The liability of the owner of an automobile who consents to have it driven by another is governed by section 59 of the New York Vehicle and Traffic Law. That section imposes liability on the owner of a motor vehicle for its negligent operation in the business of the owner or otherwise, as long as it is being used with his permission, express or implied. There is a statutory presumption, once ownership of the automobile has been shown, that the car was being driven with permission, *Orlando v. Pioneer Barber Towel Supply Co.*, 239 N.Y. 342, 146 N.E. 621 (1925), and it has been held that the statute was intended to impose liability upon the state as well as private owners. *Adams v. State,* 296 N.Y. 654, 69 N.E.2d 815 (1946).

It has also been held that section 59 does not extend the liability of the owner beyond the common-law liability of a master for the acts of his servant within the course of his employment. *Psota v. L. I. R. R.,* 246 N.Y. 388, 159 N.E. 180 (1927). Under the common law, if a master ordered his servant not to take passengers in the master's automobile and a passenger in the car was subsequently injured due to the servant's negligence, the master was not liable. *Rolfe v. Hewitt*, 227 N.Y. 486, 125 N.E. 804 (1920). In the *Psota* case, involving just such a situation, the court held the owner not liable under the statute.

In general, under section 59, an owner by prohibiting the operator from carrying passengers may avoid liability where the prohibition is violated. *Arcara v. Moresse*, 258 N.Y. 211, 179 N.E. 389 (1932). However, *Lamica v. Vollmer,* 270 App.Div. 1063, 63 N.Y.S.2d 31 (1946), *aff'd,* 296 N.Y. 660, 69 N.E.2d 817 (1946), seems at first glance to hold that even an express prohibition will not defeat recovery as long as the passenger is furthering the master's business. In the *Lamica* case the owner of the vehicle was held liable for any injury to a passenger who rode at the request of the driver, who felt sick, although a public service commission order prohibited carrying passengers on trucks operating on a permit from the commission. In a memorandum opinion, the appellate division said that the jury could have legitimately inferred from the evidence that the passenger's presence in the truck did not violate the commission order. The prohibition in the *Lamica* case did not appear to be absolute. Even though the commission's order stated that no passengers would be allowed, it was treated by the court as permitting the presence of passengers if in furtherance of the master's business. It is not reasonable to conclude that the public service commission would allow only one person in a truck at a time. In a situation where the passenger was aiding the driver in furthering the master's business, the court apparently felt that the prohibition should not be given effect. Even if the prohibition were absolute, it was not that of the owner, but rather of the public service commission. There was no evidence of express prohibition on the owner's part against carrying passengers, and the rule laid down by the administrative agency probably was not intended to shield the owner from liability. The *Lamica* case can thus be reconciled with the proposition that an express prohibition by the owner against carrying passengers will negate liability under section 59. If the facts show that the passenger was not prohibited and he was aiding the owner's business, the owner will be held liable for the passenger's injury caused by the negligence of the permittee.

Since the owner is not ordinarily liable to a passenger under section 59 for the negligence of the driver if he has ordered the driver not to accept passengers, the question in the *Burmaster* case was whether the memorandum actually prohibited Mrs. Burmaster's presence in the automobile. The conclusion of the court, that Mrs. Burmaster was assisting her husband in the business of the state by aiding him in driving, seems to be based upon a fair and proper construction of the departmental memorandum which in terms only prohibited the use of state-owned cars for purposes not strictly in line with performance of official duty.

There was still another issue in the case. The dissent concluded that the plaintiff failed to show that the state had knowledge, actual or implied, that the plaintiff was riding in the car, and claimed that such knowledge must be shown in order for the plaintiff to establish a cause of action. On this issue, *Roche v. New York Cent. R.R.*, 221 App.Div. 497, 224 N.Y.Supp. 656 (1927), is in point. In that case, an owner was held liable for the negligence of an operator driving with her consent, although she was unaware that plaintiff's intestate had been invited into the automobile.

The majority of the court in the *Burmaster* case agreed with the *Roche* decision, holding that the presumption created by section 59 renders it unnecessary that the owner know about the injured person's presence in the automobile. The need for such actual knowledge would seem to be inconsistent with the wording and intent of section 59. Since that section makes the owner liable for the negligence of his permittee, an injured passenger who is free from contributory negligence and is acting in furtherance of the owner's business, should be able to hold the latter liable in the absence of an unqualified prohibition.

In construing section 59, liability will be found whenever a fair interpretation of the facts permits. *Jackson v. Brown & Kleinhenz, Inc.*, 273 N.Y. 365, 7 N.E.2d 265 (1937). In the *Burmaster* case, the court of appeals has followed this policy.

K. E. N.

CRIMINAL LAW—ARREST—SEARCH AND SEIZURE—PROBABLE CAUSE

In *Henry v. United States*, 361 U.S. 98 (1959), the Supreme Court reversed a judgment of conviction of petitioner for the unlawful possession of three cartons of radios stolen from an interstate shipment, in violation of 18 U.S.C. § 659 (1958), on the narrow ground of the absence of probable cause for petitioner's arrest by two agents of the Federal Bureau of Investigation.

On the day of the arrest the agents were investigating leads to a theft of whisky from a Chicago terminal. The agents had received information from the employer of one Pierotti concerning the "implication" of Pierotti with interstate shipments. When the agents observed Pierotti and petitioner leave a certain tavern and drive away in an automobile, they followed the car until it stopped in an alley in a residential district. Petitioner left the car, entered a gangway and returned in about two minutes carrying some cartons which he placed in the back of the car. The agents lost sight of the car but located it parked near the same tavern. Pierotti and petitioner again left the tavern and drove back to the same alley; petitioner entered the gangway and returned with more cartons. Since the agents were approximately 300 feet from the gangway, they were unable to see the number, size or contents of the cartons. When Pierotti and petitioner drove away, the officers followed and forced the car to a stop by driving directly in front of it and making a head-on stop. As petitioner stepped out of the car he was overheard to tell Pierotti: "Hold it. It is the G's," and "Tell him he [you] just picked me up." The cartons bearing the interstate shipping labels were visible to the agents through the open door of the car. The agents were told by Pierotti that the car had been borrowed from a friend and that the cartons were in the car at the time he had borrowed it. After searching the car, the agents took Pierotti and petitioner to their office.

A few hours later, when it was determined that the cartons had been stolen from a motor truck, Pierotti and petitioner were officially placed under arrest.

Under 18 U.S.C. § 3052 (1958) agents of the FBI are authorized to ". . . make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony." Mr. Justice Douglas, writing the majority opinion, pointed out that the statute merely states the requirement of probable cause embodied in the Fourth Amendment. It is settled that this requirement applies to arrests as well as to searches. *Giordenello v. United States,* 357 U.S. 480 (1958).

Without question the pivotal point of the principal case is the time of arrest. The Government conceded in the court of appeals, Seventh Circuit, and in the Supreme Court that the arrest occurred when the car in which petitioner was riding was forced to a stop. In the court of appeals the judgment of conviction was affirmed on a divided vote. *United States v. Henry*, 259 F.2d 725 (7th Cir. 1958). There the majority opinion disregarded the concession of the Government and decided that the arrest occurred following the discovery of the cartons bearing the interstate shipping labels and the unsatisfactory explanation concerning the ownership of the car. The majority of the court urged that the agents at this point had reasonable grounds to believe that a felony was then being committed. In reversing the judgment below, the Supreme Court held that the arrest was complete when the agents "interrupted the two men and restricted their liberty of movement" and at that time probable cause did not exist for the arrest leading to the incidental search that produced the evidence upon which the conviction rested.

While no certain test can be applied to determine whether probable cause exists for an arrest or search in a specific factual situation, the federal courts, as a guide, frequently allude to the test of probable cause laid down by the Supreme Court in *Stacey v. Emery*, 97 U.S. 642 (1878): "If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offence has been committed, it is sufficient." *Id.* at 645.

If the Court's determination that the arrest occurred when the car was forced to a stop can be accepted, the decision seems perfectly sound since it appears that the requirement of probable cause was not then satisfied. The record did not disclose nor could the Government explain in what manner Pierotti was "implicated" with interstate shipments. Neither did the record show that petitioner had ever been suspected of criminal activities. The loading of cartons of undetermined number, size and contents into a car in an alley in a residential district, driving away and returning to load again should not warrant a prudent man in believing that a crime is being committed. While it certainly was unnecessary for the agents to have possessed legal evidence of the commission of a crime when the car was stopped, *Brinegar v. United States*, 338 U.S. 160 (1949); *Husty v. United States*, 282 U.S. 694 (1931), the fact that the agents were suspicious of petitioner's activities could not have validated the arrest. Suspicion alone will not satisfy the requirement of probable cause. *Mallory v. United States*, 354 U.S. 449 (1957); *Carroll v. United States*, 267 U.S. 132 (1925); *Poldo v. United States*, 55 F.2d 866 (9th Cir. 1932). Justice Douglas suggested, however, that the decision might have been different if the cartons had been loaded at a terminal or interstate trucking platform.

The subsequent discovery several hours after the men were taken into custody that the cartons contained radios stolen from an interstate shipment could not have been a basis for sustaining the prior arrest. As the majority opinion emphasized, probable cause must be determined by the existence of facts known to the officer at the time of arrest, not upon facts which a subsequent search uncovers.

Johnson v. United States, 333 U.S. 10 (1948); *United States v. Di Re,* 332 U.S. 581 (1948); *Byars v. United States,* 273 U.S. 28 (1927).

In the *Johnson* case, an officer of the Seattle police and federal narcotic agents, acting on information from an informer, went to the hotel of petitioner with neither a search warrant nor a warrant of arrest. After the officers had gained admission to petitioner's room, she was told to consider herself under arrest because they were going to search the room. The search uncovered opium. The Supreme Court held that the evidence obtained through the search could not justify the prior unlawful entry and arrest.

Mr. Justice Clark in the dissenting opinion in the principal case (concurred in by the Chief Justice) contended that the Court was not bound by the concession of the Government as to the time of arrest. He argued that the ''implication'' of Pierotti with interstate shipments, the loading of the cartons in the alley, the ''suspicious activities of the two men during the somewhat prolonged surveillance'' justified the stopping of the car, and the sighting of the cartons with interstate labels gave the agents reasonable ground to believe that a felony was being committed in their presence. He felt that the rationale of the *Brinegar* and *Carroll* cases supported the judgment of conviction.

In the *Carroll* case, prohibition agents had arranged for a liquor purchase from defendants, a purchase which never materialized. Later, while the agents were patrolling a highway known to be a leading highway for carrying contraband liquor from Canada, they recognized, stopped and searched the car of defendants and found liquor which was being transported in violation of the National Prohibition Act of 1921. In affirming the judgment of conviction, the Supreme Court decided that the agents had reasonable cause, as required by the statute, to believe that the car was being used to transport intoxicating liquor.

The defendant in the *Brinegar* case was convicted of importing intoxicating liquor in violation of the Liquor Enforcement Act of 1936, now 18 U.S.C. § 1262 (1959), which prohibited such importation whenever it was contrary to the laws of any state. Here two agents were patrolling the border between two states when they recognized defendant, known by them to be a convicted liquor violator, driving at a high rate of speed, with the rear end of his car heavily loaded, from the direction of an area nortorious as a source of bootleg liquor. Such facts satisfied the majority of the Court that probable cause existed for the officers' giving chase and searching the car of the errant liquor vendor.

While the Supreme Court, in these two cases, recognized that the common use of high speed motor vehicles for transporting contraband necessitated some relaxation in the law of searches where motor vehicles were involved, because of the impracticability of obtaining a search warrant in many instances, it did not dispense with the requirement of probable cause. The Court in *Carroll* stated: "But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise." 267 U.S. at 154. This pronouncement was quoted with approval in the *Brinegar* case. It should also be noted that in the *Carroll* and *Brinegar* cases the Supreme Court recognized that the officers had personal knowledge of illegal activities of defendants before they stopped the cars. Such knowledge was lacking in the principal case.

Although the principal case provides no definitive test for determining when probable cause exists for the search without a warrant by an officer who suspects the violation of a federal statute, the decision should dispel any belief that the Supreme Court has relaxed the standards incident to the requirement of probable cause for the search of a moving vehicle. A strict adherence to these standards, as demonstrated by the decision in the *Henry* case, indicates the burden which, at times, will be placed upon law enforcement officers. Such a burden, however, seems greatly preferable to the oppressiveness which would result if a traveler on the highways could be stopped and his car searched on the mere whim or suspicion of an officer of the law.

J. L. B.

DOMESTIC RELATIONS—INJUNCTION AGAINST FRENCH DIVORCE ACTION DENIED

It was held in *Arpels v. Arpels*, 9 App.Div.2d 336, 193 N.Y.S.2d 754 (1959), that an alien wife was not entitled to an injunction restraining her alien husband from seeking a divorce in a French court when she was subject to French law and personally within the jurisdiction of the French court when the divorce action was instituted.

The plaintiff-respondent was Helene Arpels, a native of Monaco, domiciled in New York. The defendant-appellant was Louis Arpels, a native and citizen of France. The parties were married in France in 1933 and lived there until 1940 when they came to New York. They resided in New York from 1940 until 1954, when they separated. Between 1946 and 1954 they spent about an equal amount of time in both countries. The parties had substantial contacts with France and Louis Arpels maintained a permanent residential property there. The husband had important business interests in both countries; his only place of residence in this state was a New York City hotel.

In 1954 the Arpels made a separation agreement providing Mrs. Arpels with 18,000 dollars annual support until her death or remarriage which sum was to survive any divorce action wherever instituted. Mr. Arpels was to maintain a 10,000-dollar life insurance policy with his wife as beneficiary, but if there were a divorce decree in any jurisdiction upon grounds recognized in New York this obligation was to terminate. Mrs. Arpels instituted a separation action in New York that same year. Both alleged residence in New York and the husband consented to the decree entered in his wife's favor which incorporated the separation settlement.

The divorce action instituted in France in 1958 by Louis Arpels was based on infidelity and cessation of affection. In the injunction suit the wife alleged her residence in this state and that in the divorce suit the allegations by her husband of his residence in France and the service of process upon her by leaving the notice with a maid at her temporary place of sojourn in accordance with French law were fraudulent. She pleaded hardship and irreparable injury as there would result a divorce by default valid upon its face if she failed to appear. Special term, having acquired personal jurisdiction of the defendant husband, granted a temporary injunction pending the determination of the action for a permanent injunction and denied the husband's cross-motion to dismiss for insufficiency, upon the ground that the inconvenience and possible injustice to a New York resident outweighed the court's reluctance to interfere. Since the husband resided here part of the year and since it cannot be said that the French decree would not receive recognition, the lower court saw a need to explore the jurisdiction of the foreign court. *Arpels v. Arpels,* 17 Misc.2d 471, 187 N.Y.S.2d 100 (Sup. Ct. 1959).

The court in the case at bar was faced with the question of this state's adjudicative policy as to preventing access to foreign courts in marital suits by parties whose marital rights have been the subject of a prior New York decision.

Several considerations bore upon the decision refusing injunctive relief. The former policy in this state concerning the allowance of injunctions against marital suits in other jurisdictions was summarized in *Hubbard v. Hubbard,* 228 N.Y. 81, 126 N.E. 508 (1920). That case involved an action by a husband to annul his North Dakota marriage on the grounds that the Massachusetts divorce of his wife was void because against the public policy of New York. The court, giving effect to the Massachusetts decree, said that the state courts had the exclusive right to decide whether a foreign divorce decree contravened state policy or wronged its citizens and whether justice and morality would be served by awarding it comity. However, in respect to matrimonial judgments rendered in other states, *Williams v. North Carolina*, 317 U.S. 287 (1942); 325 U.S. 226 (1945), has removed this large measure of discretion.

It was there held that when jurisdiction has been acquired, full faith and credit must be given divorce judgments of sister states. This prima facie validity accorded marital decisions of other states led New York to modify its attitude toward injunctive relief because of the burden now imposed upon a defendant in such an action in disproving the presumptive regularity of the action, and because of the danger to the marital status of New York residents from a procedurally valid judgment. For example, a wife suing for separation in New York was awarded a temporary injunction against a divorce suit by her husband instituted in the Virgin Islands, *Garvin v. Garvin,* 302 N.Y. 96, 96 N.E.2d 721 (1951). A temporary injunction was granted a wife as an incident to an action for a permanent injunction against a Florida suit by the husband, *Hammer v. Hammer*, 303 N.Y. 481, 104 N.E.2d 864 (1952).

The court in the principal case declared, however, that the reluctance to restrain judicial proceedings outside the jurisdictional limits of this state continues in respect to courts in foreign countries. The discretion previously exercised as to all marital actions has not been changed by the *Williams* decision, and the *Garvin* case was limited to actions pending or about to be instituted in sister states. There is no constitutional compulsion to grant full faith and credit to judgments of foreign countries. Policy and comity are determinative of recognition of such judgments, *Rosenbaum v. Rosenbaum*, 309 N.Y. 371, 130 N.E.2d 902 (1955).

Another principle governing the granting of injunctions is that which denies relief where it appears that adequate relief will be obtained in the foreign action. Mere distrust of the foreign court, preference for domestic courts or hardship and inconvenience do not justify the exercise of this extraordinary remedy. *Paramount Pictures, Inc. v. Blumenthal,* 256 App.Div. 756, 11 N.Y.S.2d 768, *appeal dismissed*, 281 N.Y. 682, 23 N.E.2d 15 (1939).

Considering the alienage of the defendant who was seeking to invoke the domestic law of his own country to adjudicate the status of a marriage consummated in that country with an alien wife who was personally served, the court noted that the contacts with New York were too few to justify the interposition of a restraining arm upon the action in the French court. The court made the distinction between preventing a citizen from invoking the processes of his own nation and the New York prerogative to decide the measure of recognition it will accord the resulting judgment. The fact that a separation judgment was awarded here afforded no greater justification for granting injunctive relief abroad. The parties themselves contemplated possible future action concerning their marital status, as evidenced by their settlement agreement. There was no showing of fraud, irreparable injury or lack of jurisdiction which the French court would fail to correct.

The court made it clear that injunctive relief will not be denied solely in a situation such as that existing in *Rosenbaum,* where the New York resident defendant had never established a residence in Mexico upon which the court could ground its jurisdiction so that the divorce would be patently defective with no possibility of recognition here. Although New York would ordinarily accept a French adjudication of the marital rights of a French citizen as a matter of comity and policy, it does not follow that it must do so. Therefore, it would seem that injunctions may be refused against potentially valid foreign decrees as well as against invalid ones.

The dissenting opinion drew an analogy between the *Arpels* case and the sister-state cases. The defendant had factually supported the jurisdiction of the French court and the dissenting judge felt, relying on *Gould v. Gould,* 235 N.Y. 14, 138 N.E. 490 (1923), that New York policy is not offended by and requires recognition of the divorce judgments of France. Furthermore, the plaintiff, domiciled here, would suffer hardship if the injunction should be refused. The dissent, therefore, advocated adjudicating the disputed issue of domicile here before a divorce was procured in France. However, the similarity between the case under discusion and the *Garvin* and *Hammer* cases ends when it is considered that there would be an interference with the courts of a foreign country when there is no compulsion to recognize a resulting judgment. The statement that New York is required to recognize a divorce judgment of France does not appear supported by New York decisional law. *Gould v. Gould, supra,* cited by the dissent, does not compel such a conclusion. The court in that case recognized the divorce procured by the husband in France and dismissed the wife's divorce action. But it held merely that the French divorce on the ground of the wife's adultery in France did not contravene the policy of New York on the facts presented. The reasons of policy that would lead a New York court to give effect to the decisions in a French marital suit are not as impressive as those policy reasons dictating a sparing use of injunctions against the maintenance of foreign actions. The majority opinion in *Arpels* adverted to the fact that this state passes upon the propriety of a foreign judgment when called upon to award it comity and not when called upon to enjoin the action in advance. When New York has a minimal interest in a case there seems no justification for intervention.

The *Arpels* case indicates that the New York courts are not ready to equate foreign decrees with those of sister states and that injunctive relief against the prosecution of a foreign divorce action will not be granted, even when the foreign action may result in a valid and enforceable decree. It should not be thought, however, that injunctions against the maintenance of a foreign action will be uniformly denied, for the *Arpels* case makes it clear that a showing of necessity may result in the granting of an injunction. What will be sufficient necessity remains to be decided as future cases arise.

A. R. C.

INNKEEPERS—LIABILITY FOR ACTS OF SERVANT WITHOUT THE SCOPE OF EMPLOYMENT

As a result of the recent case of *McKee v. Sheraton-Russell, Inc.*, 268 F.2d 669 (2d Cir. 1959), it is difficult to say what the responsibilities of a hotel owner in New York may be with respect to the personal safety, comfort and convenience of his guests.

In that case plaintiff, a guest of defendant hotel, returned to her room from a bath to find a bell boy crouched near her bed. The bellboy, who was off duty at the time, had obtained a passkey from the hotel desk, where keys were readily available to employees. The bellboy remained in plaintiff's room in spite of considerable protest, making advances and suggestive remarks for approximately twenty minutes. As a result, plaintiff suffered fright, shock and aggravation of a pre-existing ailment. In an action brought in the federal district court for the southern district of New York on diversity grounds, the trial judge charged the jury that defendant would be liable upon a finding that its employee entered her room without permission and for no justifiable cause. The jury returned a substantial verdict for plaintiff and judgment was entered accordingly.

On appeal, the circuit court reversed and remanded for a new trial, holding that a hotel has no absolute duty to protect its guests, but only a duty of reasonable care measured by the grade and quality of the accommodations offered. In remanding the case, however, the circuit court instructed the lower court that it is not essential to the stating of a cause of action against a hotel that the employee was acting within the scope of his employment. Judge Hand concurred in the reversal of the judgment but dissented from the instruction.

Prior decisions in New York do not support or even anticipate the second rule announced in the *McKee* case, that an inkeeper may be liable, depending upon the quality of accommodations offered, for misconduct by employees when they are not engaged in the duties of their employment. It should be noted, however, that they do not exclude such a result, since on the one hand an innkeeper assumes a quasi-public responsibility and on the other he enters into a contractual relationship with his guest. The majority in the *McKee* case relies heavily upon *DeWolf v. Ford*, 193 N.Y. 397, 86 N.E. 527 (1908). There the court of appeals upheld a complaint which alleged that while plaintiff, her daughter and brother were guests of defendant hotel, a hotel employee, while in the discharge of his duties, forced his way into plaintiff's room and accused her of being a disreputable person. She was then ordered to leave the hotel. The court reasoned that a guest for hire at a public inn has a right to insist upon respectful treatment from the innkeeper and his servants. It was made clear throughout the opinion, however, that the employee's misconduct occurred while in the discharge of his duties.

In *Stone v. Eisen Co.*, 219 N.Y. 205, 114 N.E. 44 (1916), another case relied upon by the majority, an employer who sold orthopedic appliances was held liable for the failure of his employee to act in accordance with the implied personal service agreement entered into with plaintiff. In that case, also, the employee's wrongful acts occurred while in the discharge of his employment. The other decisions relied upon by the majority in the *McKee* case did involve assaults by employees who were seemingly not acting within the scope of their employment. As pointed out by Judge Hand, however, those cases relied without justification on *DeWolf v. Ford, supra.*

The rule set forth in the *McKee* case, that an innkeeper may be liable for the misconduct of his employees within the hotel, even when off duty, is not supported by precedent in New York. Judge Hand says in his dissenting opinion: ". . . [I]t appears to me that the New York law does not impose any liability upon an innkeeper for personal maltreatment of a guest by one of his servants, unless the servant was acting within the scope of his authority, or unless the innkeeper had not used due diligence in selecting the servant, or in supervising his conduct.'' 268 F.2d 669, 673.

In *Boyce v. Greeley Square Hotel Co.*, 228 N.Y. 109, 126 N.E. 647 (1920), it was held that an innkeeper is liable, as any master, for the acts of his servants done in the prosecution of his business. It must be conceded, however, that the law in this regard has never been well established, and it may be argued that existing confusion is due largely to dictum in *Calye's Case*, 4 Co. Rep. 202, 77 Eng. Rep. 520 (1584), which has been cited as supporting the proposition that no liability results from the beating of a guest within the innkeeper's premises. See *Rahmel v. Lehndorff*, 142 Cal. 681, 76 Pac. 659 (1904). The court of appeals, however, has characterized that proposition as dictum, and, while recognizing that there might be conditions under which a guest could be assaulted without subjecting the innkeeper to liability, has stated: ''. . . [U]nder no reasonable construction could that language be held to mean that an innkeeper and his servants might assault a guest and yet not be liable.'' *DeWolf v. Ford*, 193 N.Y. 397, 406, 86 N.E. 527, 531 (1908).

Thus courts have permitted recovery against an innkeeper where it was shown that he was in some way negligent himself or that his employee was negligent within the scope of employment. In *Rommel v. Schambacher*, 120 Pa. 579, 11 Atl. 779 (1887), a saloonkeeper was held liable for a guest's injury when he failed to provide protection against the assaults of intoxicated persons, and in *Curran v. Olsen*, 88 Minn. 307, 92 N.W. 1124 (1903), liability was similarly imposed upon a saloonkeeper where it was shown that his employee failed to protect a guest from vicious persons knowingly permitted to remain about the premises.

Where it could not be shown, however, that an innkeeper was himself negligent so that the misconduct of an employee occurred within the scope of employment, the innkeeper has been held not liable. *Rahmel v. Lehndorff*, 142

Cal. 681, 76 Pac. 659 (1904). In *Clancy v. Barker*, 131 Fed. 161 (8th Cir. 1904), it was held that an innkeeper is not the insurer of his guest's personal safety against the acts of servants when they are without the course and without the actual or apparent scope of their employment. A federal court in Massachusetts was virtually alone in resisting the result of the *Rahmel* and *Clancy* cases. In *Crawford v. Hotel Essex Boston Corp.*, 143 F. Supp. 172 (D. Mass. 1956), the court decided that where a guest is assaulted by an employee, whether or not the latter is within the scope of his employment, the guest has at least a contractual claim for consequential damages.

After it is determined that an innkeeper has a duty to exercise reasonable care in providing for the safety, comfort and convenience of his guests, as in *DeWolf v. Ford,* 193 N.Y. 397, 86 N.E. 527 (1908), and *Stott v. Churchill,* 15 Misc. 80, 36 N.Y. Supp. 476 (N.Y.C.C.P. 1895), it would naturally follow that this duty would come to be measured by the standards required of common carriers, since in certain other respects their responsibilities and those of an innkeeper are the same. It has long been held, for example, that, absent statute, an innkeeper, like a common carrier, is an insurer of the personal property of his guests, *Millhiser v. Beau Site Co.*, 251 N.Y. 290, 167 N.E. 447 (1929). It was not difficult to extend this holding to a similar obligation for the personal safety of guests. The majority in the *McKee* case relied upon this reasoning in saying: ''If an innkeeper cannot escape liability for damage to a guest's goods by showing that the damage was occasioned by a servant acting without the scope of his employment, it is difficult to understand why an innkeeper should be able to use that defense to escape liability for injury to a guest's person.'' 268 F.2d 669, 672–73.

Since the circuit court reversed the judgment of the district court, which had charged the jury that a hotel had an absolute duty to protect the personal safety of its guests, the development of the innkeeper's liability was not carried to its logical conclusion in the *McKee* case. The decision, nevertheless, has substantially affected the scope of a hotel's obligations in New York. It is difficult to make a reasonable distinction between the imposition of liability on a hotel when injury to a guest is occasioned by the wilful wrongdoing of an off-duty employee and when it is occasioned by the wrongdoing of another guest. To maintain a distinction, therefore, between a rule of absolute liability and the rule suggested by the majority, the courts will have to apply the latter rule in accordance with a factual determination as to the quality of accommodations a particular hotel purports to provide.

It is difficult to predict the future of the rule promulgated by the *McKee* case. In view of other decisions in this state the New York courts will probably be cautious in adopting it with full force. The *McKee* case may, nevertheless, substantially affect the relationship between an innkeeper and his guest in New York.

B. P. W. JR.

JUDGMENTS—COLLATERAL ESTOPPEL—EFFECT OF PRIOR FINDINGS OF FACT

The application of the doctrine of collateral estoppel to findings of fact made in a prior action involving a different ultimate issue has been clarified in *Hinchey v. Sellers*, 7 N.Y.2d 287, — N.E.2d —, — N.Y.S.2d — (1959). There it was held that a New Hampshire judgment determining the issue of permissive use within the meaning of an automobile insurance policy precluded recovery in subsequent New York actions involving the issue of permission under section 59 of the New York Vehicle and Traffic Law.

The defendants, father and son, were Pennsylvania residents and joint owners of the automobile in which plaintiffs' intestates were riding at the time of their deaths. National Surety Company, a Pennsylvania insurer, had issued a liability policy covering the automobile and containing the usual clause insuring, in addition to the named insured, those operating the automobile with his permission. At the time of the accident, which occurred in New York, the automobile was being operated by a New Hampshire resident in the absence of both insured owners, with the son's alleged consent.

Prior to the commencement of the New York actions, plaintiffs had brought suit in New Hampshire against the operator, and, after National Surety had refused to defend on the ground that the automobile had not been operated with the permission of the insureds, plaintiffs sought a declaratory judgment determining the insurer's duty to defend. In the latter action, it was adjudged that there had been no permissive use within the meaning of the policy and that accordingly the insurer was under no duty to defend the actions against the operator. *Hinchey v. National Surety Company*, 99 N.H. 373, 111 A.2d 827 (1955).

Plaintiffs then discontinued the New Hampshire actions and brought the present actions in New York against the joint owners of the automobile, alleging operation with the permission, express or implied, of the defendants. The answer alleged that the New Hampshire declaratory judgment action was a conclusive determination of the issue of permissive use, and defendants' motion for summary judgment was granted at special term, *Hinchey v. Sellers,* 1 Misc.2d 711, 147 N.Y.S.2d 893 (Sup. Ct. 1955), the court indicating that the relationship of indemnitor and indemnitee between the insurer and defendants permitted the defensive use by the latter of the New Hampshire judgment.

The appellate division agreed that the relationship was sufficient to allow the defensive use of the prior judgment. That court reversed the order of special term granting summary judgment, however, holding that the issue of permissive use under the insurance policy, decided in the New Hampshire action, was not identical with the issue of statutory permission under section 59 of the New York Vehicle and Traffic Law, and that therefore the evidentiary findings of the New Hampshire court were not binding in the New York actions, *Hinchey v. Sellers*, 5 App.Div.2d 440, 172 N.Y.S.2d 47 (1958). The appellate division, in considering the application of the doctrine of collateral estoppel, was unwilling to apply the doctrine unless the issue in both actions was the same. The court's reluctance was prompted by its reliance upon three cases arising from a single accident and commencing with *Fox v. City of Syracuse*, 231 App. Div. 273, 247 N.Y.Supp. 429, *aff'd*, 258 N.Y. 550, 180 N.E. 328 (1931). The facts in the *Fox* cases were similar to those of the *Hinchey* case, save that the action was brought first against the driver and the insured city and then against the insurer to enforce the judgment obtained against the driver alone. In the latter action the insurer was not allowed to plead as res adjudicata the finding in the prior action that the car had been used without the permission of the insured within the meaning of the policy, *Fox v. Employers' Liab. Assur. Corp.*, 239 App. Div. 671, 268 N.Y.Supp. 536 (1934).

While the court of appeals agreed with the appellate division that the ultimate legal issue involved in the *Hinchey* case was not the same as the issue involved in the New Hampshire action, it could not agree with that court upon the application of the doctrine of collateral estoppel, and reinstated the judgment entered at special term. The court of appeals distinguished between what it termed fragmentary findings of fact and findings essential to the judgment, adopting the rule set forth in *The Evergreens v. Nunan,* 141 F.2d 927 (2d Cir. 1944), *cert. denied,* 323 U.S. 720 (1944), that "It is of course settled law that a fact, once decided in an earlier suit, is conclusively established between the parties (or their privies) in any later suit, provided it was necessary to the result in the first suit." 141 F.2d 927 at 928. The decision in the *Hinchey* case expressly overrules the second of the *Fox* cases, *Fox v. Employers' Liab. Assur. Corp., supra,* and makes coextensive, with respect to the issue of permissive use, the liability of an insurer under its policy with that of the insured owner under section 59 of the New York Vehicle and Traffic Law. Thus while the appellate division was reluctant to expand the doctrine of collateral estoppel beyond cases where the ultimate issues are the same, the majority of the court of appeals saw no reason to permit plaintiffs to relitigate in New York the issue of permissive use merely because it appeared in the context of a New York statute rather than a Pennsylvania insurance policy.

The result in the *Hinchey* case seems proper, for it would appear that the facts could not support a finding of permission under the statute or within the meaning of the insurance policy. It might be argued that statutory permission, depending as it does upon legislative intent, is not equivalent to permission within the meaning of an insurance policy, on the ground that in the latter context the intent of the parties as determined by the terms of the contract must govern. It may well be, then, that the New Hampshire court did not find as a fact that the automobile was operated without the sort of permission which, if found, would have imposed liability under the New York statute, and this objection was raised by Judge Dye, dissenting, in the court of appeals.

While the logic of the opinion in the appellate division and that of the dissent in the court of appeals must be recognized, it would seem that if the purpose and essence of the doctrine of collateral estoppel are to be preserved, the approach taken by the majority of the court of appeals should be followed. It is submitted, however, that the rule established by the majority should be confined to cases like *Hinchey* and *Fox,* where the determination of the legal issue in the subsequent case obviously and easily follows from the determinations of fact which were essential to the resolution of the ultimate legal issues in the prior case.

J. A. C.

LANDLORD AND TENANT—CONSTRUCTIVE EVICTION—MATERIAL BREACH BY LANDLORD OF PROVISIONS OF NEW YORK LEASE FORM AS ALLOWING RESCISSION

Will the failure of a landlord to furnish services he has covenanted to provide, by the terms of a New York lease form, allow a tenant to rescind and recover compensatory damages, where the lease expressly provides that failure to render such services will not constitute a constructive eviction? This question is answered in the affirmative in *Charles E. Burt, Inc. v. Seven Grand Corp.*, — Mass. —, 163 N.E.2d 4 (1959). The opinion deserves the attention of New York attorneys since a New York lease form is involved, and, more important, since the decision is apparently the first in either New York or Massachusetts to determine the effect of the outlined provision.

In 1955 the original lessor, a New York resident, had leased the premises, located in Massachusetts, consisting of office space on the upper floor of an urban building, to the plaintiff for a term of five years at an annual rent of 4,500 dollars, payable in equal monthly installments. After November, 1957, and until the date of suit, plaintiff paid the rent to defendant, who had taken an assignment from the original lessor. The standard New York lease form employed provided that the landlord would furnish heat, elevator service and electricity, with the latter service terminable upon three months advance notice. The trial court found that the defendant, without notice to plaintiff, had failed to provide these services at all times after December, 1957, and that the failure was not due to an unavoidable cause, which would have excused the landlord by the terms of the lease. Because of defendant's nonperformance, plaintiff was forced to suspend his printing operations until alternate services could be obtained, at a cost of 1,385 dollars, exclusive of additional sums representing lost profits and machinery damage. Plaintiff then filed a bill in equity, seeking a declaration that the lease was void, an injunction restraining defendant from collecting further rents and 2,035 dollars compensatory damages. The trial court decreed for plaintiff on all items, and the lease was cancelled as of the date of filing of the bill.

On appeal, the Supreme Judicial Court of Massachusetts reversed the decree and remanded the cause, for lack of findings determining whether or not plaintiff had abandoned the premises, and, if so, upon what date. Aside from this error, the court concurred in the ruling made below, and held that failure of a lessor of urban property to furnish such covenanted services, where the failure is serious in nature and inexcusable, "... deprive the lessee of a vital part of what the landlord knows the lessee must have in order to carry on his business." — Mass. at —, 163 N.E.2d at 6. The failure of the landlord was described as a breach of the covenant of quiet enjoyment, giving rise to a cause of action for damages and a claim of constructive eviction. It is noted that in an action at law the lessee's abandonment of the leased premises would have to have taken place within a reasonable time, but that this would not be necessary to the granting of equitable relief, and that plaintiff would be entitled to a declaration of constructive eviction if abandonment had in fact first taken place, or, in the alternative, to a declaration that abandonment within a reasonable time would be allowed. In addition to this alternative declaration, the court also approved, upon remand, a recovery for all damages occasioned by the breach. With these points reviewed, the court's treatment of the interpretation problem presented by the case may now be examined.

As has been stated, the rights of the parties were governed by a New York lease form. Similarities in wording between the lease involved and the heating, electricity and elevator service covenants appearing in Steinman's Bergerman and Roth, *New York Real Property Forms* 529–30 (2d ed. 1959), point to the latter as the probable source of the articles contained in the lease in the *Burt* case. The vital provision in plaintiff's lease read: "26th . . . In respect to the various 'services' . . . to be furnished by the landlord . . . it is agreed that there shall be no abatement of the rent . . . for interruption of such 'service' when such interruption . . . shall be due to accident, alterations, or repairs desirable . . . to be made or to *some other cause* not gross negligence on the part of the landlord. [Emphasis added.] *No such interruption . . . of any such 'service' shall be deemed a constructive eviction . . . .*" — Mass. at —, 163 N.E.2d at 5. For convenience, the last sentence will be referred to as the principal clause.

The question thus raised was whether the principal clause had the effect of precluding recovery for the lessor's inexcusable failure to furnish the covenanted services, and it was held that it did not. In arriving at this conclusion, the court resorted to two established rules for the construction of written documents: A lease will be construed, in so far as its wording permits, to produce an equitable agreement between the parties, and, to the extent that a lease may be ambiguous, it will be construed more strongly against the party preparing it. *New England Foundation Co. v. Commonwealth*, 327 Mass. 587, 100 N.E.2d 6 (1951); *Watts v. Bruce*, 245 Mass. 531, 139 N.E. 650 (1923); *accord, Russell v. Allerton*, 108 N.Y. 288, 15 N.E. 391 (1888); *Foreman v. Elaine Realty Corp.*, 240 App. Div. 490, 270 N.Y. Supp. 625 (1934). In examining the lease, it is likely that the court paid some attention to article 25, which stated that the tenant would not be excused from paying rent due to the interruption of the landlord's services, where such interruption is caused by reasons beyond his control, and to article 26, stating that there would be no abatement of rent due to interruption caused by accident, alteration or repairs, or to some other cause not the lessor's gross negligence. On this assumption, it would seem that the only language in the lease having any bearing on the facts would be the phrase "some other cause, not gross negligence on the part of the landlord" and the principal clause. The trial court's finding that the defendant's failure to furnish the services was inexcusable clearly excludes interruptions due to reasons beyond his control or to accidents, alterations or desired repairs, which were made excusable by the lease. These phrases may thus be dismissed from further consideration, and the remaining phrases viewed in turn.

The first phrase to be dealt with is "some other cause," with regard to whether the landlord's inexcusable failure to furnish services could be included within its meaning. The word "some" has reference to an indeterminate quantity, and the word "other," where it follows an enumeration of particular terms, will generally be read as "others of the class enumerated." *Burns v. City of Watertown,* 126 Misc. 140, 213 N.Y. Supp. 90 (1920); *Harlow v. Tufts,* 58 Mass. (4 Cush.) 448 (1849). Having defined these words, reference must be made to the *ejusdem generis* rule of construction; that general words following an enumeration of things of a particular meaning may be regarded as applying only to things of the same general class as those specifically mentioned. *Matter of Hurlbut*, 180 Misc. 681, 44 N.Y.S.2d 450 (1943); *Commissioner v. Dalton*, 304 Mass. 147, 23 N.E.2d 147 (1939). Since the particulars preceding the clause under consideration include accidents, alterations and repairs, and deal solely with uncontrollable events or the lessor's affirmative actions, it seems certain that his inexcusable default could not be brought within the phrase "some other cause."

If the foregoing analysis is correct, only the phrase declaring, "No such interruption . . . of any such 'service' shall be deemed a constructive eviction . . ." remains. The court found this clause sufficiently ambiguous to permit the interpretation that it was meant to apply only to excusable failures, reasoning that to hold that an inexcusable failure would under no circumstances amount to a constructive eviction would defeat the general purpose of the lease. The court expressly left open the question whether a contrary interpretation of the lease would render it so unconscionable as to be void by reason of public policy. This reservation was undoubtedly prompted by statutes making the failure of a landlord to provide agreed services a misdemeanor and rendering unenforcible covenants disclaiming liability for injuries or property damage incurred upon leased premises by reason of the landlord's negligence. See Mass. Annotated Laws ch. 86, §§ 14–15 (1945), New York Penal Law § 2040, and New York Real Property Law § 234.

With regard to the principal clause, the court apparently interpreted the initial words "no such interruptions" as referring back to the previous enumeration of accidents, alterations or repairs, and, by application of the *ejusdem generis* rule, determined that the defendant's inexcusable failure was not of such like, excusable nature as to warrant its inclusion in the clause. If this explanation of the court's reasoning is sound, a prediction may be hazarded as to the possible result in a New York case presenting facts similar to those of the *Burt* case, and the harmony between prior relevant decisions in the two states would seem to suggest a similar result in this jurisdiction.

The defendant's experience in the *Burt* case will serve as a warning to the draftsmen of such disclaimers to express their covenants clearly, in order to avoid a judicial interpretation adverse to their intention. What is more, the use of a clause attempting to negate a tenant's right to claim a constructive eviction presents serious questions of public policy, and even though ambiguity may be avoided, the problem of overcoming statutory obstacles to the use of such a clause still remains. In this connection, it seems certain that the courts of both Massachusetts and New York would be attentive to the argument that a lease with provisions waiving absolutely the right to claim a constructive eviction is unconscionable and unenforcible, as against public policy.

J. J. C.

NEGLIGENCE—RULES OF CIVIL PRACTICE—SUMMARY JUDGMENT

In *Di Sabato v. Soffes*, 9 App. Div.2d 297, 193 N.Y.S.2d 184 (1959), the issue was whether a motion for summary judgment, made by plaintiffs in an automobile negligence action, should be granted. The undisputed facts of the case were that the driver stopped his car, equipped with automatic transmission and push-button control, left the motor running in neutral and, after applying the emergency brake, went to the right side of the car to help his passenger out. When the door would not open for some unexplained reason, defendant directed his passenger to slide across the seat and alight from the driver's side. He watched as she stepped on the accelerator and reached for the dashboard for leverage, accidentally shifting the car into "drive." As a result, the car careered across the street and crashed into a building, severely injuring plaintiffs, who were working inside at the time. The defendant failed to submit any affidavits or proof establishing a defense, as required by rule 113, New York Rules of Civil Practice. On these uncontroverted facts, the appellate division, reversing the special term, held that plaintiffs' motion for summary judgment should be granted.

The purpose in granting summary judgment is to afford either party to an action, where there are no triable issues of fact, relief from expensive trials and delay in decisions, and to clear congested calendars. Shientag, *Summary Judgments* 3 (1941); Prashker, *New York Practice* § 260 (4th ed. 1959). Before the recent amendment to Rule 113, effective March 1, 1959, a plaintiff in a negligence action was not allowed to move for summary judgment, Shientag, *op. cit. supra* 5, although a defendant might do so, *Lederer v. Wise Shoe Co.*, 276 N.Y. 459, 12 N.E.2d 544 (1938). Under the present rule, either party in a negligence action may move for summary judgment. In practice, plaintiff submits proof of the facts by affidavits and other legal evidence to establish a prima facie case of negligence. The defendant must then submit evidence of probative value to establish his defense, or, at least, a genuine issue of fact. *General Investment Co. v. Interborough R.T. Co.*, 235 N.Y. 133, 139 N.E. 216 (1923). Upon failure to submit such evidence, the court may find as a matter of law that there are no triable issues of fact, and grant plaintiff's motion for summary judgment. Rule 113, New York Rules of Civil Practice; Prashker, *op. cit. supra* § 262.

In the *Di Sabato* case, there was no question of fact as to what happened, save whether the defendant failed to set the emergency brake properly or whether his passenger disengaged it when she attempted to leave the car. The majority of the court had no difficulty in holding as a matter of law that plaintiffs were free from contributory negligence, and, after determining that an inference that the brakes were defective could not be drawn in the absence of proof to that effect, decided that defendant's failure to shut off the engine was, under all the circumstances, negligence as a matter of law. A strong dissenting opinion expressed the view that whether the defendant's conduct constituted negligence was for a jury to decide.

According to Prosser, *Torts* 193–94 (2d ed. 1955), it is possible in many cases to say that the conduct of an individual has clearly not conformed to what a reasonable person would do under like circumstances, and thus to hold as a matter of law that he acted negligently. Although it is primarily the duty of the court to determine law, it must also decide some questions of fact in determining whether the evidence makes an issue sufficient for the jury. Thus the correct test, in deciding whether as a matter of law the defendant is negligent in undisputed fact situations, seems to be that if men of reasonable intelligence may differ as to the conclusions to be drawn, the issue must be left for the jury; otherwise, it is for the court to decide. See *Blum v. Fresh Grown Preserve Corp.*, 292 N.Y. 241, 54 N.E.2d 809 (1944). Although the test in itself does not seem difficult, its application presents problems in border-line cases like the present one, where the majority thought that a reasonable person must reach the conclusion that the defendant was negligent.

The federal courts have been quite conservative in awarding summary judgment in negligence cases, Note, 33 *St. John's L. Rev.* 425 (1959), and have followed the general rule that issues of negligence are generally not susceptible of summary adjudication since they involve the standard of the reasonable man. 6 Moore, *Federal Practice* ¶ 56.17, at 2232 (2d ed. 1953); Prosser, *Torts* 193 (2d ed. 1955). In most negligence cases in federal courts where defendant has moved for summary judgment the motion has been denied, *Jacobs v. Pennsylvania R.R.*, 203 F.2d 290 (6th Cir. 1953), unless it conclusively appears on the basis of uncontroverted facts that plaintiff's claim is barred. *Surkin v. Charteris,* 197 F.2d 77 (5th Cir. 1952). However, in *American Airlines, Inc. v. Ulen,* 186 F.2d 529 (D.C. Cir. 1949), summary judgment was awarded to plaintiff, injured in an airplane crash, where it was shown that defendant scheduled a flight in violation of a Civil Aeronautics Board regulation.

In contrast, the lower New York courts in the past year have awarded summary judgment to plaintiffs in cases where, for example, the driver of a car injured pedestrians on the sidewalk when her foot slipped from the accelerator, *Reichert v. Walker*, — Misc.2d —, 195 N.Y.S.2d 492 (Sup.Ct. 1959); where the driver drove upon the sidewalk injuring plaintiff when she thought the latter was going to cross into her path, *Mele v. Felcher*, — Misc.2d —, 195 N.Y.S.2d 758 (Sup.Ct. 1959); and where a driver fell asleep at the wheel and drove into plaintiffs, parked at the roadside. *Stanley v. Burnside*, — Misc.2d —, 192 N.Y.S.2d 452 (Sup.Ct. 1959). Summary judgment was denied plaintiffs where they did not establish sufficient facts to enable a reasonable person to conclude only that the defendant was negligent, *Johnson v. Freeman*, 16 Misc.2d 753, 184 N.Y.S.2d 712 (Sup.Ct. 1959), and where the proof submitted presented triable issues of fact, *Schwartzberg v. Norotsky,* 20 Misc.2d 638, 194 N.Y.S.2d 26 (Sup.Ct. 1959); *Garrett v. Pelligrini*, 9 App. Div.2d 769, 192 N.Y.S.2d 796 (1959).

It is interesting to note that all these New York cases involved automobile negligence actions. The increasing use of the automobile demands that higher standards of care be established and enforced for the protection of the public. When these standards, based upon what a reasonable man would do under the circumstances, are established by a jury, they are binding only in that particular action. Bohlen, "Mixed Questions of Law and Fact," 72 *U. Pa. L. Rev.* 111 (1924). The temporary character of jury findings leads to results that seem unfair, since justice requires essentially that the same conduct under the circumstances should entail the same liability. Bohlen, *supra* at 117. It may be expected that the repetition of similar fact situations will constantly increase in the field of automobile negligence, and to permit the courts to decide as a matter of law that a defendant's conduct is negligent will establish precedents of conduct and lead to fairer and more consistent results.

Since the rule which permits the plaintiff to move for summary judgment in a negligence action has been in effect only a year, it is too early to comment upon possible continuation of the trend that has been established by the lower New York courts. While the decisions of these courts do not purport to constitute any radical change in the law of negligence, there can be no doubt that they reflect a more liberal use of summary judgments than is made by the federal courts. Whether the court of appeals will halt this trend and adhere more closely to the conservative approach of the federal courts is presently a matter of conjecture. It is hoped that New York's highest court will soon be given an opportunity to speak on the matter.

P. J. D.

RIGHT OF PRIVACY—REPRODUCTION OF NEWS STORY FOR ADVERTISING PURPOSES AS VIOLATION OF CIVIL RIGHTS LAW

Defendant prepared an advertising circular in which plaintiff's name appeared without his consent. The advertisement consisted of a reproduction of a news photograph of a burning building and an accompanying three-column story. Plaintiff and another person figured in the fire, and although nothing imputing fault to either was contained in the article, plaintiff's name, occupation and home address appeared several times. On the same side of the circular as the reproduction of the news story was the advertising copy, consisting of eleven lines of type set apart from the rest of the article, in which defendant advised prospective customers that the purchase of one of its safes would protect against the loss of valuable papers by fire. It did not appear anywhere that plaintiff consented to the use of his name or that he in any way indorsed defendant's product. Plaintiff brought an action for damages, alleging a violation of the statutory right of privacy under section 51 of the New York Civil Rights Law, and, upon a motion to dismiss, the complaint was held to state a cause of action. Upon appeal, the order entered at special term was affirmed. *Flores v. Mosler Safe Co.*, 7 N.Y.2d 276, 164 N.E.2d 853, 196 N.Y.S.2d 975, affirming 7 App. Div.2d 226, 182 N.Y.S.2d 126 (1959).

The right of privacy has been recognized in New York since 1903 by sections 50 and 51 of the Civil Rights Law. An invasion of the right may give rise to criminal liability under section 50, while section 51 provides for relief by way of injunction and damages. It was in reaction to the decision in *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902), that the statutes were enacted. In that case the court of appeals found itself unable to restrain defendants from reproducing a likeness of plaintiff for commercial purposes, unless plaintiff could properly allege a cause of action under a recognized tort such as libel.

Few laws were so completely outlined before their passage as were those protecting the right of privacy as it now exists in New York. A list of proposed limitations upon the right was arrived at as early as 1891, by drawing analogies from the then-current law of defamation and literary property rights. Warren and Brandeis, ''The Right To Privacy,'' 4 *Harv. L. Rev.* 193 (1891). The limitations are now almost universally recognized in jurisdictions having right of privacy statutes, and include the following: the right does not extend to matters of public interest; publication under conditions protected by the law of defamation is not prohibited; oral invasion requires the special damages characteristic of slander; the right may be waived by express consent or a like prior publication by the plaintiff himself; accuracy is not a defense, nor is the absence of malice, although the latter may be offered in mitigation of damages. Note, ''The Right of Privacy,'' 7 *N.C.L. Rev.* 435 (1929).

The defendant in the principal case contended that although plaintiff's name appeared, it was part of the news item taken from the New York Times, and that this mention, incidental to the report of the fire, could in no way be so associated with the advertising as to violate the statutory prohibition. It was also argued, in defense, that plaintiff had so placed himself in the public eye as to be excluded from the protection of the statute, and, by analogy, that had the action been brought upon the initial printing of the story as a news article, it would necessarily have failed; since the story was preserved intact, no better action would lie in the present case. However, as pointed out by the majority in the court of appeals, the news article had been reproduced subsequent to the time when it was properly a matter of public attention, and the court could not extend the qualification on the right to include this subsequent reproduction. Despite the fact that the article appeared exactly as it did in the New York Times, the court felt it so accompanied the included advertising that it could not be said to be a news item any longer. This reasoning nullified defendant's reliance upon *Gautier v. Pro-Football*, 304 N.Y. 354, 107 N.E.2d 485 (1952), where it was held that plaintiff, by performing in front of television cameras covering the half-time activities at a football game, had so placed himself in the public eye as to be precluded from claiming that such fresh reporting of the incident constituted a violation of the statute.

The crux of the *Flores* case lies in the argument of defendant that the article did not impute an indorsement to plaintiff and that plaintiff's name appeared only as an incident to the reporting of a fire. The need that a false indorsement be imputed is not recognized, and this defense was accordingly dismissed. There was, however, weight to the argument that plaintiff's name appeared only as a mere recitation of a fact in the news story. The majority, in dealing with this argument, felt that the defendant's message could be adequately conveyed without an invasion of the plaintiff's privacy, by portraying only the picture of the fire without caption or by substitution of fictitious names for those of the real parties involved.

Judge Van Voorhis entered a vigorous dissent, concurred in by Judge Dye, based on the premise that defendant need not generalize its warning of fire damage to such degree that its advertising might be rendered ineffectual, and that specific reference to facts already in the public domain would be wholly warranted. The dissent expressed the fear that an extension of the rule established by the majority would reduce all written communications to generalities. The majority considered this unlikely, and felt it unnecessary to sanction a violation of the statute to preclude that possibility.

The *Flores* decision, by defining more accurately the scope of sections 50 and 51 of the New York Civil Rights

Law as relating to news items, has clarified the judicial interpretation of those sections. The decision is not a departure from precedent, but may offer additional protection to a person who does not wish to have a brief public appearance made the subject of commercial advertising.

R. P. R.

TRUSTS—ALLOCATION OF STOCK DISTRIBUTIONS BETWEEN PRINCIPAL AND INCOME

In *Matter of Payne*, 7 N.Y.2d 1, — N.E.2d —, 194 N.Y.S.2d 465 (1959), the court of appeals held that where an alleged stock dividend is supported by book transfers from capital surplus to stated capital there is a stock split, and an apportionment of the stock dividend between the life beneficiary and the remainderman is not required. However, where the stock dividend is accompanied by a book transfer of earned surplus as well as capital surplus, the amount of stock corresponding to the earned surplus transfer is a stock dividend, payable to the life beneficiary.

In the *Payne* case, the trust had been created in 1915 by Oliver Payne, with income payable for life to William Bingham II and on his death without surviving descendants, remainder to Mary Payne Bingham. William died in 1955, and the trustee brought this action to settle its accounts. The trust contained shares of stock of the Standard Oil Company of Indiana and of the Borg-Warner Corporation. During the life tenancy Standard Oil declared a one hundred percent stock dividend to be supported by an entire transfer of capital surplus and sufficient additional transfers from earned surplus to the capital stock account to equal the par value of the stock. Borg-Warner issued a stock dividend of two shares for every one outstanding and also supported its dividend by transferring all the capital surplus account, including all paid-in surplus, with a sufficient transfer from earned surplus to equal the stated value of the no-par shares issued. The trust indenture made no provision for the disposition of stock dividends, and since the indenture was executed prior to 1926, the effective date of section 17-a of the New York Personal Property Law, that section was inapplicable. As to trusts created after the effective date of the section and not specifically providing for the disposition of stock dividends, all stock dividends are to be treated as capital, payable to the remainderman.

The result in *Matter of Payne, supra,* is that where the trust instrument does not otherwise provide and where section 17-a of the Personal Property Law does not apply, the percentage of the total book transfer which represents capital surplus is the percentage of stock which is to go directly to the trust corpus, and the remainder of the distribution is represented by earned surplus, which goes to the income beneficiary. In reaching this conclusion the majority of the court reasoned that a large share of the capital surplus account may never have represented earnings of the corporation. The court considered specifically the item of paid-in surplus which generally is included in capital surplus accounts and was mentioned specifically in the Borg-Warner declaration of stock dividend. The court found that if this item had been credited in the first instance directly to the capital stock account it would not have been doubted that it was part of the trust corpus and not of the corporation's earnings.

Matter of Osborne, 209 N.Y. 450, 103 N.E. 723 (1913), dealing with the problem of what is the trust corpus where shares of stock in business corporations represent part or all of it, developed what is known as the "intact value" formula. It was there held that the trust corpus is to be determined in the following manner: the capital account, plus all surplus accounts at the time the trust is established or the stock acquired by the trustee, is divided by the number of shares outstanding, the result to be multiplied by the number of shares held by the trust at the time of foundation or acquisition. This formula gives in effect what has been referred to as the book value per share and establishes the trust corpus as the book value of all the shares in the trust as of the time the trust is founded or at such time as the stock is purchased. See Conway, C.J., dissenting, in *Matter of Payne*, 7 N.Y.2d 1, 19, — N.E.2d —, —, 194 N.Y.S.2d 465, 478 (1959).

The book value per share does not ordinarily equal the market value per share, the latter depending, of course, on the views of investors as to the corporation's future. Under the *Osborne* rule the book value is to be kept intact as against any possible impairment by the declaration of an extraordinary stock dividend by the corporation. Ordinary stock dividends under the *Osborne* rule go to the life beneficiary as income, regardless of the time of accumulation. To determine whether there has been an impairment of the ''intact value'' after the declaration of an extraordinary dividend, the book value per share after the stock distribution is found, and this result is multiplied by the number of original shares in the trust before the distribution. If this figure is less than the original ''intact value'' there has been an impairment of the corpus, and the difference must be divided by the new book value per share to arrive at the number of shares of the distribution which must be allocated to the trust corpus.

A stock dividend is a capitalization of earnings and results only to the extent that earnings are capitalized. *Matter of Fosdick,* 4 N.Y.2d 646, 152 N.E.2d 228, 176 N.Y.S.2d 966 (1958). The controversy in the *Payne* case concerned the amount carried on the corporate books as capital surplus and then capitalized. The dissent contended that the object of the *Osborne* rule is to keep the book value intact, and that all stock distributions supported by transfers from surplus are income for the income beneficiary unless they impair the original book value. In other words, in the opinion of the dissent, all increase in the value of the trust corpus, other than that which the court would hold to be natural capital increments, would go to the income beneficiary. *Cf. Matter of Hagen,* 262 N.Y. 301, 186 N.E. 792 (1933).

It has long been the rule that in order to determine whether a stock distribution is to be income or principal the trustee and the court must look to the source and nature of the stock issue. *Matter of Osborne, supra.* A corporate business, like any other, uses capital to earn a profit, and a share of stock represents a contribution by the shareholder to the corporation's capital. The price which the corporation receives for the share is a debit to cash of that amount and a credit to capital stock for the par value or stated value of the shares of stock, with a credit to capital surplus or paid-in surplus of the amount in excess of the par or stated value of no par shares. Actually, then, the amount of money received by a corporation for a share of stock is capital with which to make a profit; the contributor of capital receives a share of stock which evidences his contribution and entitles him to future dividends as well as a share in amounts received from possible liquidation. See, generally, Ballantine, *Corporations* 465–66 (rev. ed. 1946).

In following the *Osborne* rule, *Matter of Fosdick, supra,* held that a stock dividend is a capitalization of earnings, and that where a stock distribution is not represented by a transfer from earned surplus it is to be considered a stock split, with the entire distribution going to the trust corpus. There are two lower court decisions holding, under the *Osborne* rule, that a transfer from capital surplus represents a stock split. *Matter of Lissberger*, 189 Misc. 277, 71 N.Y.S.2d 585 (Surr. Ct. 1947), held that transfers from capital surplus to capital stock will give a stock split rather than a stock dividend. In that case, however, the corporation had characterized the issue as a stock split in its resolution. It had previously been held in *Bourne v. Bourne*, 240 N.Y. 172, 148 N.E. 180 (1925), that the resolution of a corporation regarding the character and source of the dividend is some evidence of its actual nature in trust allocation situations. Similarly, *Matter of Sanford,* 4 Misc.2d 487, 161 N.Y.S.2d 507 (Surr. Ct. 1957), held that in so far as the transfer is from capital surplus it represents a stock split.

In *Matter of Payne, supra,* the court noted that none of the parties had shown that any thing should be stricken from the capital surplus account, and the entire capitalization of the capital surplus was held to be simply a stock split, and added to the trust principal. It thus appears that the court relied not on the name of the account, but looked to the source of the dividend and the nature of the transaction. The dissent pointed out that until 1920 corporations did not distinguish between the various surplus accounts, but had placed all surplus into one account. Even though this had been the accounting practice of corporations, it does not seem, now that corporate accounting makes income and capital more readily distinguishable, that the courts should ignore the newer practice. It may be that in the earlier cases the income beneficiary was allowed to have stock dividends based on a transfer from a lumped surplus account, but to distinguish entries in such accounts over a long period of time would have been very difficult.

The *Osborne* rule assumes that a settlor's intent would be that the income beneficiary receive that which is identifiable as corporate earnings, and a stock distribution is, in effect, a distribution of earnings which had been retained in the business. *Equitable Trust Co. v. Prentice*, 250 N.Y. 1, 164 N.E. 723 (1928). By the court's decision in the *Payne* case, corporate earnings are precisely what the income beneficiary is receiving. If corporate earnings are included by a corporation in its capital surplus account, the life beneficiary is given the opportunity to show that fact and have the earnings classified as income for his benefit.

J. U. W.

UNFAIR COMPETITION—EQUITABLE RELIEF RESTRAINING USE OF COLOR DENIED WHERE SECONDARY MEANING NOT ESTABLISHED

The competitor of a pharmaceutical manufacturer intentionally adopted the same color for its product as that used by the manufacturer, for the reason that it was a distinctive characteristic of the latter's product. On the grounds that the color was non-functional and that the competitor's action constituted unfair competition, the manufacturer sought an injunction to restrain the defendant's use of the same color in its product. The court, in denying equitable relief, held that where a patent or trademark is not involved and in absence of proof establishing a secondary meaning, the use of a color similar to that used by a competitor will not be enjoined. *Norwich Pharmacal Co. v. Sterling Drug, Inc.,* 271 F.2d 569 (2d Cir. 1959).[1]

Plaintiff, engaged in manufacturing pharmaceutical products, has marketed for over fifty years a pink liquid medication, "Pepto-Bismol," intended primarily to relieve minor stomach disorders. With emphasis on the pink color, the plaintiff, by extensive advertising on the national level for the past quarter century, has become recognized throughout the country as a leader in the field of stomach sedatives. Defendant, after investigating the plaintiff's product as well as its sales and advertising techniques, introduced in 1955 a similar medicine known as "Pepsamar," which was identical to Pepto-Bismol in chemical make-up, color and flavor but dissimilar with respect to the container and label. In advertising its product, defendant also emphasized the pink color. The evidence clearly showed and the defendant admitted that it intended, in order to compete with plaintiff, to copy as nearly as possible all characteristics of Pepto-Bismol, including the pink color. The court, purporting to apply New York law, refused to grant injunctive relief because of the plaintiff's failure to prove that a secondary meaning had attached to the pink color of its product.

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[1] Appeal now pending in the United States Supreme Court.

The oft-quoted phrase that one cannot "reap where [he] . . . has not sown" and cannot appropriate "to [himself] . . . the harvest of those who have sown," *International News Service v. Associated Press*, 248 U.S. 215, 239–40 (1918), would seem, if taken literally, applicable to the defendant's conduct in the *Norwich* case. The plaintiff has by its creation produced a superior product and by expending vast sums of money for advertising won a reputation on the market which makes the consumer desire his goods. As quite frequently happens, a competitor takes advantage of the producer's efforts and ingenuity by copying and marketing a similar product and by doing so enjoys what is known as a "free ride." If one cannot "reap where [he] . . . has not sown" then surely an injunction should have been granted.

Since competition is an essential ingredient of our economy, the law of unfair competition which governs the struggle of business life has not been as encompassing as the statement in the *International News Service* case may seem to indicate. In the early stages of the law of unfair competition in the United States, the courts required the plaintiff, in order to obtain injunctive relief, to prove that the defendant was "palming off" his goods by representing to the public that the goods sold by him were those produced or manufactured by the plaintiff. *Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co.*, 128 U.S. 598 (1888). With the development of more complex business relationships and with extensive use of different communication media for advertising purposes, the concept of unfair competition is no longer limited by the courts to "palming off," but has been extended to situations where there is an appropriation of a commercial advantage that equitably belongs to another. *International News Service v. Associated Press, supra; Dior v. Milton*, 9 Misc. 2d 425, 155 N.Y.S.2d 443 (Sup. Ct. 1956), *aff'd*, 2 App. Div. 2d 878, 156 N.Y.S.2d 996 (1956).

In the *International News Service* case, a landmark in the evolution of the law of unfair competition, the Associated Press sued to enjoin the International News Service from copying its news from bulletin boards and early editions of newspapers and selling it, either verbatim or after rewriting it, to International News Service's customers. The Court, in granting an injunction, stated: "[T]here is no attempt by defendant to palm off its goods as those of the complainant, characteristic of the most familiar, if not the most typical, cases of unfair competition. (Citations omitted.) But we cannot concede that the right to equitable relief is confined to that class of cases. . . . [I]nstead of selling its own goods as those of complainant, [the defendant] . . . substitutes misappropriation in the place of misrepresentation, and sells complainant's goods as its own." 248 U.S. at 241, 242.

The principle established in the *International News Service* case has been limited by the federal courts to its own facts. *Cheney Bros. v. Doris Silk Corp.*, 35 F.2d 279 (2d Cir. 1929), *cert. denied,* 281 U.S. 728 (1930). However, the New York courts have extended this rule to such cases as those involving appropriation of comic strip characters, *Fisher v. Star Co.*, 231 N.Y. 414, 132 N.E. 133 (1921), unauthorized recordings and re-broadcasts taken from radio broadcasts, *Metropolitan Opera Ass'n, Inc., v. Wagner-Nichols Record Corp.,* 199 Misc. 786, 101 N.Y.S.2d 483 (Sup. Ct. 1950), *aff'd,* 279 App. Div. 632, 107 N.Y.S.2d 795 (1951), and unauthorized reproductions of original fashion designs and sketches. *Dior v. Milton, supra.*

Before analyzing the court's decision in the *Norwich* case, it is of interest to note that the problem which arose is one that could have been avoided had it been possible to register a color as a trademark. However, the law is well settled that color, unless it is some part of an integral or particular design cannot be recognized as an exclusive trademark. *Leschen & Sons Rope Co. v. Broderick & Bascom Rope Co.*, 201 U.S. 166 (1906). *In re Security*

Engineering Co., Inc., 27 C.C.P.A. (Patents) 1389, 113 F.2d 494 (1940).

Since some symbols, words and designs are not capable of appropriation as technical trademarks, the courts, in order to afford adequate protection to the first comer, have developed the doctrine of secondary meaning. Although the word or symbol has a primary meaning and is incapable of exclusive appropriation as a trademark, it may nevertheless by long use in connection with the product or business of a particular producer become associated in the public mind as designating the goods or business of that producer. *American Waltham Watch Co. v. United States Watch Co.*, 173 Mass. 85, 53 N.E. 141 (1899); *Collyrium, Inc., v. Wyeth & Bro., Inc.*, 167 Misc. 231, 3 N.Y.S.2d 42 (Sup. Ct. 1938). Secondary meaning with respect to the appearance of an article has basically the same connotation except that the second comer may not copy the non-functional features, *i.e.*, non-essential elements, if they have become associated with the first comer as manufacturer or source. *Crescent Tool Co. v. Kilborn & Bishop Co.*, 247 F. 299 (2d Cir. 1917); *Mavco, Inc. v. Hampden Sales Ass'n*, 273 App. Div. 297, 77 N.Y.S.2d 510 (1948).

With complete acceptance and further expansion of the doctrine established in the *International News Service* case the New York courts, in an attempt to give more comprehensive relief against unfair competition, have held in two appellate division cases that the law of unfair competition no longer requires that a secondary meaning result from the plaintiff's use of names or designs incapable of exclusive appropriation. *Santa's Workshop v. Sterling*, 282 App. Div. 328, 122 N.Y.S.2d 488 (1953); *Avon Periodicals, Inc. v. Ziff-Davis Pub. Co.*, 282 App. Div. 200, 122 N.Y.S.2d 92 (1953), and it was upon these decisions that the plaintiff in the *Norwich* case relied.

In the *Avon* case the defendant adopted the title ''Eerie,'' the same as that previously employed by the plaintiff, for its magazine. The court held that plaintiff had no exclusive right to the use of the word "Eerie" nor had the use of the name achieved a secondary meaning identifying its magazine but, notwithstanding this conclusion, the court enjoined defendant's use of the word. It should be noted that the defendant also closely duplicated size, format, design and illustrated cover of plaintiff's magazine.

Plaintiff, in *Santa's Workshop v. Sterling, supra,* used unique designs of the legendary figure of Santa Claus to advertise its business. The court, in upholding the complaint in which the plaintiff sought an injunction restraining the defendant from copying the design, pointed out that no one was entitled to exclusive use of the historical and legendary figure of Santa Claus. Even though the court recognized the established principle applicable to designs which are *publici juris,* it held that the law of unfair competition no longer required the plaintiff to establish that a secondary meaning had attached to its design. The controlling question when the equity power of the court is invoked is not whether a secondary meaning has been established, but whether the acts of the defendant are fair or unfair, according to principles recognized in equity.

The federal courts have recognized this development in the law of unfair competition as applied by the New York courts; the broad and liberal holdings in the *Avon* and *Santa's Workshop* decisions have been followed, for example, in cases where the defendant copied non-functional features of the plaintiff's bracelet which had not acquired a secondary meaning, *Flint v. Oleet Jewelry Mfg. Co.*, 133 F. Supp. 459 (S.D.N.Y. 1955), and where the defendant advertised and packaged its product in a manner similar to that of the plaintiff's product. *Noma Lites, Inc. v. Lawn Spray, Inc.*, 222 F.2d 716 (2d Cir. 1955).

On the theory that secondary meaning was no longer required in New York to sustain a finding of unfair competition, the trial court in the *Norwich* case permanently enjoined the defendant from using the pink color in its product Pepsamar. The circuit court in reversing this decision stated that equity will restrain only such practices as constitute palming off, actual deception, appropriation of another's property or proof of secondary meaning. The court recognized that the New York courts have granted relief without proof of secondary meaning, but distinguished such cases on the ground that either some element of palming off, actual deception, or appropriation of another's property was present. In *Santa's Workshop, Inc. v. Sterling, supra,* the other element present was palming off, while in *Flint v. Oleet Jewelry Mfg. Co., supra,* and *Avon Periodicals, Inc. v. Ziff-Davis Pub. Co., supra,* it was actual deception.

The court in refusing to grant relief, followed the long established doctrine that use of a color, not a part of an integral design, will not be enjoined unless the plaintiff proves secondary meaning. *Doeskin Products, Inc. v. Levinson,* 132 F. Supp. 180 (S.D.N.Y. 1955); *Radio Corp. of America v. Decca Records, Inc.,* 51 F. Supp. 493 (S.D.N.Y. 1943); *Germanow v. Standard Unbreakable Watch Crystals, Inc.,* 283 N.Y. 1, 27 N.E.2d 212 (1940); *Fischer v. Blank,* 138 N.Y. 244, 33 N.E. 1040 (1893); *Omega Oil Co. v. Weschler,* 35 Misc. 441, 71 N.Y. Supp. 983 (Sup. Ct. 1901). In the few cases where the court has enjoined the defendant from using the same color in its product without proof of secondary meaning, other acts of unfair competition were present. *Coca Cola Co. v. Gay-Ola Co.,* 200 F. 720 (6th Cir. 1912); *Gillette Safety Razor Co. v. Triangle Mechanical Laboratories Corp.,* 4 F. Supp. 319 (E.D.N.Y. 1933).

In view of the *Avon* and the *Santa's Workshop* holdings, the decision in the *Norwich* case may seem inconsistent with the recent development of the law of unfair competition in New York. Although the broad language of these two cases could have been seized upon to justify the granting of relief for the plaintiff, it would be reasonable to assume that the New York courts would not, in the light of prior cases involving color, have enjoined the use of a color without the showing of secondary meaning attaching thereto. The primary colors are few in number and although the color in the *Norwich* case was not of this category, it would be possible if relief had been granted for one to monopolize a particular pastel shade to the exclusion of others by simply being the senior appropriator.

L. W. G.

Digests of Current Decisions

ARTICLE 78 PROCEEDING

Section 36 of the Banking Law prescribes that reports of examinations of the Banking Department shall not be subject to subpoena nor made public, unless, in the judgment of the superintendent, the ends of justice and public advantage will be served. Respondent, a justice of the supreme court, had informally consented to admit a report of an examination of the American Trust Co., a defendant in an action before him. Petitioner is Superintendent of Banks and brings an article 78 proceeding for an order prohibiting respondent from admitting report. Respondent urged that the remedy was not an appropriate one. *Held:* An article 78 proceeding is an appropriate remedy where a justice has indicated at a preliminary hearing that he will admit evidence specifically made free from divulgence by statute. *Clark v. Flynn,* 9 App. Div.2d 249, 193 N.Y.S.2d 401 (1st Dep't, November, 1959).

CAPITAL GAINS

Actions by taxpayers engaged in the business of raising minks for the purpose of selling mink pelts, for refund of taxes on ground that income received from sale of mink pelts from minks culled from taxpayers' breeding herds was entitled to treatment as capital gains rather than ordinary income. *Held:* Sections 117(j) of the Internal Revenue Code (1939), now section 1231(b)3 of the 1954 Code, pertaining to treatment of gains and losses from sale of property used in business, was intended to provide relief for all taxpayers having to sell assets used in their trade or business. The addition of the term ''livestock'' to such section was not intended to limit such relief but to clarify the right of farmers and other animal raisers to it and such animals do not have to be alive when sold. *United States v. Cook,* 270 F.2d 725 (8th Cir. 1959).

COMPULSORY INSURANCE

On August 15, 1957, defendant issued to plaintiff a certificate of insurance required by the compulsory insurance law in order to register a motor vehicle. In procuring the certificate plaintiff made false representations. Shortly thereafter, defendant discovered those misrepresentations and, on August 23, mailed a notice to plaintiff that the insurance was "cancelled and declared void from its inception. . . ." Defendant then notified the Motor Vehicle Bureau that plaintiff's insurance was terminated, effective August 15. Section 93-c of the Vehicle and Traffic Law states that such insurance cannot be cancelled until ten days after the mailing of notice to the insured. Plaintiff obtained new insurance on August 27, and submitted a certificate of insurance to the Motor Vehicle Bureau. This certificate was rejected, since there was a lapse of insurance coverage from August 15 to August 27, and plaintiff had failed to surrender voluntarily his registration. Plaintiff seeks a declaratory judgment declaring that notice to plaintiff was not effective until September 2, hence that there was no lapse of coverage. *Held:* Section 93-c is the sole and exclusive method by which insurance coverage can be terminated and the section abolished the common law right of rescission *ab initio* for fraud. *Teeter v. Allstate Ins. Co.,* 9 App.Div.2d 176, 192 N.Y.S.2d 610 (4th Dep't, November, 1959).

CONFLICT OF LAWS

Plaintiff, a citizen and resident of New York, was injured in an automobile collision in Virginia, first by one Waring, a citizen and resident of New York, and then by defendants. Waring was killed in the accident. Plaintiff sued Waring in New York and settled with his estate for $9,000 and gave the administratrix a general release which expressly reserved all rights against defendants. The federal district court in Pennsylvania dismissed the complaint on the ground that under Virginia law a release of one joint tortfeasor operates to release all joint tortfeasors regardless of any reservations against those joint tortfeasors not parties to the release. The Pennsylvania courts in such an action would refer to the Virginia law. *Held, affirmed:* Where a tort case is in a federal court solely by reason of diversity of citizenship of the parties, the federal court takes its applicable rule of law from the state courts of the district in which it sits, including their conflict of laws references to laws of other states, where relevant. *Bittner v. Little,* 270 F.2d 286 (3d Cir. 1959).

CONTRIBUTORY NEGLIGENCE

The plaintiff enrolled in an opera workshop course conducted under the auspices of the defendant. While rehearsing for an opera role with the group, plaintiff was directed to make a ''haughty'' exit from the stage without looking down, which involved stepping down some twenty inches. Plaintiff protested the danger involved in this maneuver but the director reassured her that it would be all right and also warned that the failure to comply with this direction would mean loss of the role. Plaintiff carried out the order and received personal injuries as a result. Defendant claims that plaintiff was contributorily negligent and the complaint insufficient. *Held:* Judgment dismissing complaint affirmed. A reasonable person would not have relied upon the statements of the director. Here, also, the plaintiff had knowledge of the danger and knowingly exposed herself to the danger. Her motive to preserve her role in the opera although professionally and artistically justifiable does not legally excuse the failure to exercise reasonable care in regard to her safety. *Verduce v. Board of Higher Educ.*, 9 App.Div.2d 214, 192 N.Y.S.2d 913 (1st Dep't, November, 1959).

ESTATE VALUES

Decedent, at the time of her death on April 23, 1953, owned, besides other properties of substantial value, a certain number of United States Treasury Bonds. By valuing the bonds at par rather than market value, their taxable value was increased by $26,965.62. This resulted in an increase in the amount of estate taxes collected by $13,968.20, which is the subject of the claim in this suit. *Held:* The value of every item of property includible in the gross estate is the fair market value thereof at the time of decedent's death. *Bankers Trust Co. v. U.S.*, 178 F.Supp. 267 (S.D. N.Y. 1959).

EVIDENCE

Plaintiff-appellant, a motorcycle policeman, brought an action for injuries sustained in collision with defendant's automobile. Defendant driver pleaded guilty to charges in traffic court of failing to signal before turning and failing to make proper turn. These violations arose out of the accident with plaintiff. Upon the trial of the civil action, plaintiff sought to prove defendant's pleas of guilty as admissions against interest, but the trial court excluded the evidence. *Held:* No error. The pleas of guilty to charges of traffic violations were properly excluded. While the plea of guilty may be logically relevant because of its reference to a fact in issue, it is utterly lacking in probative value. Pleas of guilty and convictions in traffic violations lack trustworthiness since they more likely constitute a compromise or yielding to time and circumstances, rather than an admission against interest. *Ando v. Woodberry*, 9 App.Div.2d 125, 192 N.Y.S.2d 414 (1st Dep't, November, 1959).

FEDERAL ARBITRATION

Plaintiff, a Massachusetts corporation, seeks to recover damages for fraudulent misrepresentation by defendant, a New York corporation, which induced plaintiff to purchase and pay for a quantity of woolen fabric. The contract of sale referred any complaint which could not be settled to arbitration. *Held:* The validity and interpretation of the arbitration clause of the contract involving "commerce" controlled by federal law, *i.e.*, the Federal Arbitration Act, rather than by local law. The parties intended that arbitration proceedings encompass a charge of fraud in the inducement. The federal statute distinguishes between the entire contract on the one hand and the arbitration clause of the contract on the other. The latter only is valid, irrevocable, and enforceable, and a stay will be granted on any issue referable to arbitration under an agreement in writing. It is not necessary for a court to decide whether or not there was fraud in the inducement. The New York view that the arbitration clause does not encompass the question of fraud in the inducement is considered too narrow. *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402 (2d Cir. 1959).

FEDERAL PRACTICE RULES

Defendant commenced an action against plaintiff in federal district court for violation of anti-trust laws. Plaintiff then commenced present actions in the supreme court of New York for goods sold and delivered and upon negotiable instruments. Under the compulsion of subdivision (a) of rule 13 of the Federal Rules of Civil Procedure, plaintiff interposed counterclaims in the federal court for the same relief sought in his state action. The state supreme court stayed plaintiff's proceedings pending determination of the federal district court action. *Held:* A litigant may litigate for the same relief in both state and federal courts until judgment is obtained in one court. The adoption of subdivision (a) of rule 13 did not and was not intended to void that policy. *Admiral Corp. v. Reines Distribs., Inc.*, 9 App. Div.2d 410, 194 N.Y.S.2d 932 (3rd Dep't, December, 1959).

INCOME TAX

Action against District Director of Internal Revenue for income tax refund. Taxpayer purchased ten single-premium ten-year endowment policies with funds obtained from a bank loan. Plaintiffs-appellants contend that since taxpayer could not have an annual deduction for interest paid on the borrowed funds, these payments should be considered as part of the cost of the policies in determining his gain; also that any amount by which the proceeds received under the insurance policies exceeded taxpayer's payments should be treated as long-term capital gain. *Held:* Interest payments to a bank for funds borrowed to purchase a life insurance or endowment policy are not part of the consideration paid for that policy under section 22 (b) (2) (A), 26 U.S.C. (I.R.C. 1939). Also the difference between premiums and proceeds of endowment policies do not constitute long-term capital gain rather than ordinary income for income tax purposes. *Chapin v. McGowan*, 271 F.2d 856 (2d Cir. 1959).

INJUNCTION

Action by a hospital and its sole stockholder, a physician, for injunction against the continuance of an alleged conspiracy by defendants to destroy the business and reputation of the plaintiffs. Libel and slander causes of action were also alleged. Defendants contend that the complaint is insufficient and that it seeks to enjoin libel and slander. *Held:* The complaint establishes a basis for injunctive relief by alleging defendants' false statements, the conspiracy to destroy plaintiffs' business and reputation and no adequate legal remedy. Equity will not restrain publication of unjust and malicious matter simply on showing of its falsity but will restrain tortious acts if necessary to preserve business or property interests and will also restrain the publication of false and defamatory words where they are the means or an incident of such tortious conduct. *Wolf v. Gold*, 9 App.Div.2d 257, 193 N.Y.S.2d 36 (1st Dep't, November, 1959).

JONES ACT

Suit by a seaman brought under the Jones Act for personal injuries. Petitioner was employed as a mate on respondents' barge. While the barge was in repair yard, he was ordered by his supervisor to lay some decking on a raft which was not being used in connection with the barge. As petitioner was standing on a catwalk preparatory to starting this work, it gave way, causing the injuries. Respondent claims that petitioner at the time of the injury was not within the scope of a seaman's employment or engaged in activities in furtherance of the operations of the vessel and therefore was not covered by the Jones Act. *Held:* The test of coverage under the Jones Act is not whether the injury occurred in navigable waters but whether the seaman was injured by negligence "while in the course of his employment." Since the employee here already had the status of a seaman, the nature of his duties at the time of the injury is immaterial. The Jones Act only requires a seaman to be acting within his employment at the time of the injury, which does not have to occur on the vessel. *Braen v. Pfeifer Oil Transp. Co.*, 361 U.S. 129 (1959).

LIABILITY—COMMON CARRIER

Plaintiff, a shipper, seeks to recover the full value of a box of platinum which defendant carrier failed to deliver. Plaintiff knowingly failed to package box as required for precious metals. He also declared value as $50 and paid the ordinary freight rate. Defendant treated the shipment according to its regular procedure for money and precious metals. *Held:* Plaintiff can recover the full amount. Generally, the tariff or rate schedule filed and published in accordance with the Interstate Commerce Act, 49 U.S.C. § 6 becomes part of the contract of carriage, binding on both parties. However, since defendant had some appreciation of the value of the goods, although not necessarily their full value, the charge bore no reasonable relation thereto, but was in fact discriminatory or preferential. Therefore, defendant did not establish a valid contractual limitation of liability to $50. *W. R. Grace & Co. v. Railway Express Agency, Inc.*, 9 App.Div.2d 425, 193 N.Y.S.2d 780 (1st Dep't, December, 1959).

LIBEL AND SLANDER

Plaintiff, a physician-surgeon, alleges that defendants, a health insurance corporation and two of its officers, made defamatory statements charging that plaintiff was not competent to act as a surgeon. For this reason, it was stated, plaintiff's hospital appointments had been cancelled or not renewed. The statements were made at hearings of defendant's medical control board, called to investigate plaintiff's qualifications to act as surgeon for a medical group, independent contractors supplying indemnified medical care to the insured. Plaintiff alleges that the statements were made maliciously and without justification. *Held:* Defendant's motion for summary judgment granted. A qualified privilege exists where the person communicating has an interest or a duty and the statement is made to someone having a like interest or duty, although the information is otherwise slanderous. Plaintiff, in order to prevail, must show that the statements were false and motivated by actual malice. The burden is on the plaintiff and the evidence must warrant submission of the questions to the jury. Defendant's affidavits show that motivation was not malice, but duty. Plaintiff's affidavits are lacking in any evidentiary facts. A motion for summary judgment may not be defeated by suspicion and surmise. *Shapiro v. Health Ins. Plan*, 7 N.Y.2d 56, 163 N.E.2d 333, 194 N.Y.S.2d 509 (November, 1959).

NEGLIGENCE

The infant plaintiff was trespassing in defendant's railroad yard. An employee saw plaintiff and two others holding on to ladders on a moving freight car. He yelled to them to get off and began to run toward them. Plaintiff became frightened and fell or slipped off the ladder sustaining severe injuries. *Held:* The owner or occupier of land owes mere trespassers or bare licensees only the duty of abstaining from inflicting intentional, wanton or wilful injuries. There is no affirmative duty to make the place safe for them. The acts of defendant's employee, here, were reasonable and proper and did not constitute affirmative negligence. Judgment for the defendant affirmed. *Lo Casto v. Long Island R.R. Co.*, 6 N.Y.2d 470, 160 N.E.2d 846, 190 N.Y.S.2d 366 (July, 1959).

RES IPSA LOQUITUR

Plaintiff was a passenger on defendant's airline and was injured while attempting to adjust his seat. A spring-loaded lever had to be raised to release the seat back. When released, the lever was supposed to be pulled down by spring tension so that one of its notches would fall into a knob on the seat back, thus locking it into position. Plaintiff was injured when the lever snapped back against his thumb, causing a chip fracture. *Held:* Under New York law, the principle of res ipsa loquitur applies. An inference of negligence is warranted where the injury is one which would not occur in normal course of events had reasonable care been exercised by those in control of the instrumentality causing it. The evidence showed that the seat lever, obviously intended for passenger use, was under enough tension to fracture a bone. Careful inspection would have disclosed the defect. *Gerard v. American Airlines, Inc.*, 272 F.2d (2d Cir. 1959).

SHORT SWING PROFITS

In a suit by a stockholder to recover short-swing profits allegedly realized by defendants, the evidence showed that the individual defendants meticulously complied with all the reporting requirements of the act with respect to their interests in the stock of the corporation, that they attended meetings at which they were advised by qualified personnel that the corporation's stock option plan was within the exemption afforded by Rule x–1613–3 of the SEC, that they received letters and memoranda from eminent counsel containing the same advice and that only after they had been given such advice, did they enter into any of the transactions complained of in the complaint. Rule x–1613–3 had later been held invalid. *Held:* Persons who act in good faith in conformity with any rule or regulation of the Commission are not subject to liability if such rule or regulation is subsequently rescinded or invalidated for any reason. *Van Aalten v. Hurley*, 176 F.Supp. 851 (S.D.N.Y. 1959).

USURY

Plaintiff, assignee of a borrower, brought an action against defendant lender to recover pledged collateral or, in the alternative, to recover the difference between the amount received by the lender on the sale of the collateral and the amount of the debt, on the ground that the underlying loan was usurious. The borrower had executed a promissory note promising to repay the principal and interest and, in addition, to surrender contingent rights to part of the profits on the sale of the collateral stock for more than a stated price. Defendant lender argued that the loan constituted an exception under section 379 of the General Business Law to the general usury statutes. *Held:* Although the note stated that it was payable on demand, it was one for a fixed period of time and therefore the usury exception is not applicable. Also, the plaintiff as an assignee of the borrower may recover only that portion of the collateral left after deducting the principal loan and lawful interest in a usury action. The privilege of attacking a usurious loan without paying the amount of the loan and legal interest is personal to the actual borrower and is not designed to permit a borrower's assignee to avoid a just indebtedness. Therefore the assignee must tender principal and legal interest as a condition for relief. *Moore v. Plaza Commercial Corp.*, 9 App.Div.2d 223, 192 N.Y.S.2d 770 (1st Dep't, November, 1959).

VOUCHING IN

Defendant, while driving his father's auto was involved in an accident in which defendant's wife was injured. She sued the father, and plaintiff, the father's insurer, caused a third-party complaint to be served against defendant. The father caused the complaint to be dismissed, and the plaintiff notified the defendant that it would take action against him for any amount it was obligated to pay his wife. Plaintiff paid the wife's judgment and brought this action. Defendant defends by a denial of negligence and plaintiff moves for summary judgment claiming defendant was vouched in by plaintiff in the original action. *Held:* A person not a party to an action cannot vouch in his indemnitor. Since the plaintiff here was not a party to the original action it could not vouch in defendant and bind him by the determination of negligence in the first action. *Glens Falls Ins. Co. v. Wood*, 9 App.Div.2d 201, 193 N.Y.S.2d 147 (3rd Dep't, November, 1959).

WORKMEN'S COMPENSATION

Claimant, a taxi driver, struck and injured a pedestrian with his cab, but was not physically injured himself. When asked for his license, claimant became angry and abusive and was subsequently reprimanded at a hearing held to determine whether his hack license should be revoked. A month after the accident claimant was admitted to a hospital suffering from a mental condition caused by the psychological trauma which followed the accident. *Held:* An employee may not recover Workmen's Compensation for mental injury precipitated by mental cause, where no physical injury occurred. *Chernin v. Progress Service Co.*, 9 App.Div.2d 170, 192 N.Y.S.2d 758 (3rd Dep't, November, 1959).

WORKMEN'S COMPENSATION

A compensation award was made to plaintiff, injured allegedly through the negligence of a third party, the defendant, but he never received any compensation because his employer was not insured and was insolvent. The employer never brought a third-party action. Defendant contends that plaintiff's present suit is barred by section 29 of the Workmen's Compensation Law, providing that if the injured employee fails to bring a third-party action within one year after its accrual, the cause of action is assigned to his employer and hence that the employee plaintiff is not the real party in interest. *Held:* To interpret the statute as providing for an automatic assignment of the cause of action even though the award was not paid, would bring about an unreasonable result not intended by the legislature. *Juba v. Gen. Builders Supply*

Corp., 7 N.Y.2d 48, 163 N.E.2d 328, 194 N.Y.S.2d 503 (November, 1959).

WRONGFUL DEATH

Plaintiff's intestate and defendant's intestate were both fatally injured in an automobile accident allegedly due to the negligence of defendant's intestate. The latter died the day of the accident; the plaintiff's intestate died three days later. In an action for damages for wrongful death, it is argued that defendant's intestate, having predeceased the plaintiff's intestate, was not "a person against whom a cause of action exists," within the meaning of section 21 of the New York Civil Practice Act. *Held:* A suit commenced within the time limitations of section 21 is not affected by the death of the tort-feasor prior to that of his victim. The second paragraph of section 118 of the Decedent Etate Law permits the survival of a cause of action against a wrongdoer's legal representative, even though the wrongdoer has predeceased his victim. *Gibson v. Meehan*, 7 N.Y.2d 93, 163 N.E.2d 874, 195 N.Y.S.2d 649 (December, 1959).

Legislation

CODE OF CRIMINAL PROCEDURE

Proposed Sections 880–886-a—New—Section 521-b—New—Section 517–520, 528—Amended—Civil Practice Act—section 1250-a—New—Extraordinary Proceedings for Review of Conviction or Sentence in a Criminal Action or in Certain Criminal Proceedings.[1]

Review of a final judgment of conviction or sentence in a criminal case at common law could be obtained by the writ of error coram nobis. In *Lyons v. Goldstein,* 290 N.Y. 19, 47 N.E.2d 425 (1943), the court of appeals recognized the inherent power of a court in a criminal case to set aside its judgment on the ground of fraud or misrepresentation. Since this decision, there have been many applications by prisoners for relief from convictions and sentences.

A writ of error coram nobis has been granted where defendant had not been asked if he wished counsel or had not been assigned counsel, *Bojinoff v. People*, 299 N.Y. 145, 85 N.E.2d 909 (1949); where perjured testimony was knowingly introduced, *Morhous v. Supreme Court of the State*, 293 N.Y. 131, 56 N.E.2d 79 (1944); where a sentence was erroneous because of a previous conviction not specified by statute, *People v. Shaw*, 1 N.Y.2d 30, 133 N.E.2d 681, 150 N.Y.S.2d 161 (1956); *People v. Kronick*, 308 N.Y. 866, 126 N.E.2d 307 (1955); and where a denial of due process was found, *People v. Silverman*, 3 N.Y.2d 200, 144 N.E.2d 10, 165 N.Y.S.2d 11 (1957). Coram nobis lies to correct errors arising out of facts outside the record. However, an exception to this rule is recognized where the defendant is denied his right of counsel.

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[1] Recommendation of the New York Law Revision Commission, Leg. Doc. (1960) No. 65(H). Failed to pass.

When a court imposes a sentence which is beyond its power to impose, coram nobis as well as habeas corpus may be available to correct the error, *People ex rel. Carollo v. Brophy*, 294 N.Y. 540, 63 N.E.2d 95 (1945). A serious problem at the present time concerns the large number of applications that is made for coram nobis or habeas corpus. The Uniform Post-Conviction Procedure Act has attempted to solve this problem and that of the choice between the two remedies by imposing a limit on the number of applications which can be made and by replacing both habeas corpus and coram nobis by a consolidated proceeding. Under the Uniform Act the coram nobis forum is used, but the grounds of relief are expanded to include the grounds for habeas corpus.

Habeas corpus is guaranteed by the New York Constitution, article I, section 4, and a procedure therefor is contained in article 77 of the Civil Practice Act. The Law Revision Commission is recommending a codification of the New York law relating to coram nobis which would keep this proceeding separate and distinct from habeas corpus. It is their belief that the consolidated remedy existing under the Uniform Act is neither necessary nor desirable.

Under the Uniform Act, the petitioner must be imprisoned and have been convicted of a felony in order to obtain review. The proposed legislation provides for review of a conviction in a criminal action or a sentence which has been imposed thereon, even if petitioner is not at the time imprisoned.

The proposed section 880 of the Code of Criminal Procedure establishes the grounds upon which an extraordinary proceeding for review of a conviction in a criminal action may be maintained, as follows:

"a) That the conviction was obtained or the sentence was imposed in violation of applicable provisions of the constitution of the United States or of the constitution or law of this state;

b) That the court in which the conviction was had was without jurisdiction of the action or proceeding;

c) That the court by which sentence was imposed was without jurisdiction to impose the sentence;

d) That the sentence imposed was not authorized by law;

e) That the conviction or sentence is otherwise subject to collateral attack upon any ground heretofore available under a writ of habeas corpus, motion to vacate a judgment of conviction otherwise known as a motion or application for a writ of error coram nobis, motion by defendant for resentence, or other common-law or statutory remedy."

Section 881 provides that such an extraordinary proceeding may not be maintained if there has been a waiver of the grounds of relief or they have been finally litigated. However, failure to assert the alleged ground of relief in the original action or by appeal or other proceeding for review, will not constitute a waiver if in violation of applicable provisions of the United States or New York constitutions so as to deprive petitioner of his right to assert the ground of relief. If there is an error appearing on the record of the action or proceeding in which conviction was had or sentence was imposed, the ground of relief shall be deemed waived or finally litigated, unless the ground relates to one or more of the following: the jurisdiction of the court, the authority of the court to impose the sentence, the denial of right to counsel or right to be advised of right to counsel, the fact that the ground was not known and could not have reasonably been discovered, or a miscarriage of justice which would result if the ground of relief were deemed waived or finally litigated. Subject to these qualifications, if the petitioner has made a previous application for relief, his ground of relief will be deemed waived or finally litigated, but not if the previous relief sought was obtainable only by habeas corpus or was expressly stated to be denied without prejudice. Laches may bar the petitioner's ground of relief unless one of the exceptions applies.

The extraordinary proceeding for review may be commenced by petition to the court where the conviction was obtained, and an application for a writ of habeas corpus may be transferred to that court under section 882. This provision for transfer permits the court where the conviction was had to issue a writ of certiorari instead of a writ of habeas corpus.

The proposed procedure in this proceeding under section 883 requires that the petition should identify the action or proceeding in which the petitioner was convicted, identify any further proceeding against which he is trying to procure relief, set forth specifically the grounds upon which relief is sought, state the relief sought, identify any previous proceedings that the petitioner has taken to secure relief from the conviction or sentence and state the disposition thereof. Records and written evidence supporting the allegations should be attached or if not attached, then the petition should explain their absence.

Section 884 sets forth the requirements for a petition where the proceeding is commenced by transfer.

Under section 885, the answer of the people to the petition must be served on petitioner and filed within thirty days after receipt of a copy of the petition by the district attorney or on receipt of the order transferring the proceeding. Within thirty days after the service of the answer or motion, the petitioner may file an affidavit in opposition thereto. At any time before the answer, the people may move to dismiss the petition on the ground that it fails to allege grounds for relief, or that the petition is otherwise defective, or that the proceeding is not maintainable. In lieu of such answer, or motion, the district attorney can consent to a hearing or concede to any part of the allegations. The court may dismiss of its own motion any petition which is defective in form before answer or motion by the people, but such dismissal is without prejudice to the filing of a subsequent petition. At any time before entry of final order in the proceeding, the court may grant leave to withdraw the petition and make any appropriate orders as to amendment of the pleadings.

Under section 886, where the district attorney files a statement which does not contest the allegations of the petition or assert that the ground of relief is waived or finally litigated, a hearing is discretionary. If the petition and attached documents substantially comply with the statute and a ground of relief is stated, a hearing must be held unless the allegations therein are conclusively refuted, or the record of the proceedings resulting in conviction or sentence, or documentary proof or evidence offered by the petitioner clearly establish that the asserted ground of relief has been finally litigated or waived. Facts constituting the ground of relief must be established by a fair preponderance of the credible evidence. Section 886 adopts the rule of *People v. Smyth*, 3 N.Y.2d 184, 143 N.E.2d 922, 164 N.Y.S.2d 737 (1957), that a petition for coram nobis which fails to state a ground of relief may be dismissed without a hearing. The proposed statute also adopts the rule that if the documentary evidence, including the record, is ''unquestionable'' so that no triable issue exists as to its veracity, then it is conclusive on both the allegations of the petitioner and the fact of waiver or previous final litigation. See *People v. Picciotti,* 4 N.Y.2d 340, 151 N.E.2d 191, 175 N.Y.S.2d 32 (1958); *People v. Guariglia,* 303 N.Y. 338, 102 N.E.2d 580 (1951); *People v. Richetti,* 302 N.Y. 290, 97 N.E.2d 908 (1951).

Where the normal time to appeal from a criminal conviction or sentence has expired, permission to take an appeal may be allowed where there is shown to be a deprivation of the petitioner's right to appeal. This situation is covered by new section 521-b, which expressly authorizes an order in an extraordinary proceeding permitting notice of appeal to be served within a time fixed by the court.

The proposed new section 1250-a of the Civil Practice Act and the proposed amendments to sections 517, 518, 519, 520 and 528 of the Code of Criminal Procedure provide that a petition for a writ of habeas corpus may be treated as an application for an order commencing an extraordinary proceeding for review in certain cases.

The aim of this legislation is to codify New York decisional law pertaining to the writ of error coram nobis and to discourage repetitions of unwarranted applications for this writ. The legislation further provides that applications for habeas corpus, where that is the wrong remedy, will not bar relief by way of the extraordinary proceeding for review. The express statement of the grounds for relief in the statute and the formulation of a definite procedure will result in reducing the burden on the courts, thus expediting the review of convictions or sentences in criminal actions or proceedings.

J. A. M., JR.

PERSONAL PROPERTY LAW

Section 85—Amended—Section 85-a—New—Statute of Frauds governing contracts to sell goods and sales of goods.[1]

On the basis of the recommendation of the Law Revision Commission, legislation has been enacted to diminish the scope of coverage of the Statute of Frauds in contracts for the sale of goods and to give greater flexibility where its coverage remains.[2]

The legislation does not change the requirements applicable to a contract to sell or a sale of choses in action. With respect to such contracts, no change would be effected by new section 85-a of the Personal Property Law.

The number of cases in which the failure to satisfy the Statute of Frauds may be raised as a defense will be decreased by the amendment to section 85. The fifty-dollar value of goods which previously separated contracts which were within or without the Statute will be raised to five hundred dollars. Under the Uniform Sales Act, section 4, which has been adopted in many states, the five hundred dollar demarcation line is used.

Presently excluded from the operation of the statute are contracts in which the goods are to be specially manufactured by the seller for the buyer. In New York, a contract in which goods are to be specially manufactured is within the Statute if the seller in turn had the goods made by a third party. *Eagle Paper Box Co. v. Gatti-McQuade Co.*, 99 Misc. 508, 164 N.Y.Supp. 201 (Sup. Ct. 1917); *Schneider v. Lexinsky*, 162 N.Y.Supp. 769 (Sup. Ct. 1917). Under the amendment to section 85, this latter type of contract will also be excluded and the Statute will no longer be a defense.

At the present time, the Statute of Frauds is satisfied by a memorandum of the transaction which contains every element of the contract, *Stone v. Browning*, 68 N.Y. 598

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[1] Recommendation of the New York Law Revision Commission, Leg. Doc. (1960) No. 65 (F).

[2] N.Y. Sess. Laws 1960, ch. 287.

(1877). However a mistake in the price terms of the memorandum will invalidate the whole memorandum, *Friedman v. Newman,* 255 N.Y. 340, 174 N.E. 703 (1931). By the amendment the memorandum is only required to show the making of the contract and the quantity of goods. Errors or omissions, instead of rendering the memorandum void would merely limit the enforceability of the contract to that amount.

Acceptance and receipt of any part of the goods contracted for will take the contract out of the Statute. As provided by section 85, acceptance may be by words or conduct. That provision is now amended to provide that retention of such goods will also constitute an acceptance for purposes of proving the contract.

Part payment or the giving of something in earnest vitiates the use of the Statute as a defense. Since ''earnest'' has been construed by the courts to mean the same as part payment, *Clinton Paper Co. v. Mills Paper Co.,* 275 App. Div. 665, 87 N.Y.S.2d 918 (1949); *De Waal v. Jamison,* 176 App. Div. 756, 163 N.Y.Supp. 1045 (1917), *aff'd mem.,* 226 N.Y. 644, 123 N.E. 862 (1919), the term is deleted.

To prevent the practice of invoking the Statute of Frauds in order to avoid an undisputed agreement, section 85 would have been amended by the insertion of a provision which would make an agreement for the sale of goods enforceable if the party against whom enforcement of the contract is sought admits the existence of the contract. Any voluntary or involuntary admission in the pleadings, or at any other stage of the action, of facts which would have made a sufficient memorandum of the agreement sought to be enforced satisfies this section. However the agreement is enforceable only for the amount of goods admitted.[3]

The changes in the Statute of Frauds as it relates to the sale of goods will relax to some extent the present strict requirements of a writing which satisfies the statute.

A. F. C.

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[3] This provision was not included in the section as enacted.

Section 84-a—New—Immaterial variance between offer and acceptance.[1]

Under New York decisional law an acceptance, to be valid, must conform exactly to the terms of the offer for a contract to come into being. Where the offeree suggests, with his acceptance, a slight variation or addition to a proposed contract to sell or a contract for the sale of goods such variation or addition has been held to be a counteroffer and therefore a rejection. This is so despite any intent of the offeree to accept the basic, original offer unequivocally. The leading case requiring that the acceptance match the offer exactly is *Poel v. Brunswick-Balk Collender Co.,* 216 N.Y. 310, 110 N.E. 619 (1915), which held that an acceptance fails if it is modified and is therefore equivalent to an absolute rejection.

The strict approach of the courts was lessened to some extent in *Valashinas v. Konuito*, 308 N.Y. 233, 124 N.E.2d 300 (1954), where an acceptance of the buyer's offer to sell a partnership interest was held valid even though the seller added terms in reference to the time and place of the closing. The new terms were looked upon as being suggestive only, not conditional. This holding, although a departure from the former strict view, is thought to be restricted to its own facts.

The Law Revision Commission, to facilitate the extension of a more liberal view, is recommending section 84-a of the Personal Property Law which will permit an immaterial variance between the offer and acceptance:

An expression of acceptance of an offer to make a contract to sell or a sale shall not be insufficient as an acceptance of the offer merely because it states additional or different terms which do not materially vary the terms of the offer unless the acceptance is expressly made conditional on assent to the additional or different terms. Such additional or different terms shall be deemed an offer for addition to or modification of the contract.

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[1] Recommendation of the Law Revision Commission, Leg. Doc. (1960) No. 65 (C). N.Y. Sess. Laws 1960, ch. 360.

This new section will validate an acceptance containing additional or varying terms providing they do not materially change the terms of the offer and providing the offeree does not make his acceptance conditional upon agreement by the offeror to these added terms. The additional terms in the acceptance varying the offer will be treated as an offer for addition to or modification of the contract.

A. F. C.

Proposed Section 220-a—New—Reletting where the tenant abandons the premises.[1]

In *Gray v. Kaufman Dairy & Ice Cream Co.*, 162 N.Y. 388, 56 N.E. 903 (1900), the tenant abandoned the premises before the expiration of his lease having defaulted in the payment of rent. The landlord refused to accept this abandonment as a surrender of the lease and relet part of the premises to a new tenant. The landlord sued the abandoning tenant for the deficiency in rent. The court held that the landlord could not recover since the reletting of the premises without the abandoning tenant's consent amounted to an acceptance of a surrender and terminated the tenant's liability for rent. The holding of the *Gray* case seems to be unsound since the landlord should not be obligated to let his premises remain vacant and deteriorate in value merely because the tenant refuses to consent to a reletting. Moreover, it is to the tenant's advantage to permit the landlord to relet since the amounts received by the landlord through the reletting reduce the tenant's liability for rent.

The rule of the *Gray* case would be overcome by subdivision one of proposed section 220-a of the Real Property Law:

"Where a tenant of real property has abandoned the premises, a reletting of the premises by the landlord, or an attempt by him to relet the premises, shall not be evidence of acceptance of a surrender of the lease. If the landlord relets the premises without termination of the lease, amounts received by the landlord as a result of such reletting, less the reasonable expenses of such reletting, shall be credited to the tenant in reduction of his liability for rent."

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[1] Recommendation of the New York Law Revision Commission, Leg. Doc. (1960) No. 65 (A). Failed to pass.

ERRATA

Page 99, line 16. For "former" read "latter."

Page 226, lines 9–10. The citation for *Mallory v. United States* should read: "354 U.S. 449 (1957)."

Where the tenant consents to a reletting or where there is a provision in the lease permitting reletting after abandonment by the tenant, the landlord may allow the premises to remain vacant and still hold the tenant for the rent for the balance of the lease, *Sancourt Realty Corp. v. Dowling*, 220 App. Div. 660, 222 N.Y.Supp. 288 (1927). The clause in the lease permitting reletting imposes no duty upon the landlord to relet. He may refuse to relet even where he has opportunities to do so because the duty to mitigate damages has no application to a contract of leasing, *Sancourt Realty Corp. v. Dowling, supra.*

In *59 Madison Ave. Corp. v. Bauer,* 15 Misc. 2d 780, 180 N.Y.S.2d 1013 (N.Y.C. Munic. Ct. 1958), the tenant defaulted in his payment of rent and abandoned the premises. There was a clause in the lease permitting reletting, but the landlord refused to relet and sued the tenant for the unpaid balance. In his defense, the tenant contended that the landlord wilfully and deliberately refused to accept a responsible and desirable tenant who was ready, able and willing to fulfil all the terms and conditions of the lease. Although the court rejected this contention, it suggested that the defense should be recognized but that such a liberalization of the law was a matter for the legislature, 15 Misc. 2d at 782, 180 N.Y.S.2d at 1015.

Subdivision two of proposed section 220-a of the Real Property Law would effectuate such a liberalization:

''If the landlord brings action against the tenant for the rent agreed to be paid for the balance of the term remaining after such abandonment, or for any part of the balance of the term, the tenant, notwithstanding any provision of the lease may plead and prove as a defense or partial defense that an opportunity or opportunities to relet all or part of the period for which recovery is sought were offered to the landlord, and that the landlord unreasonably failed or refused so to relet. Such defense or partial defense shall be effective to the extent of the amount that the landlord might reasonably have been expected to recover as a result of such reletting, less the reasonable expenses of such reletting.''

The purpose of this legislation is to modify the principle that the rule of mitigation of damages has no application to a contract of leasing, by permitting the tenant to prove as a defense in an action by the landlord for rent that there were opportunities to relet but that the landlord unreasonably failed or refused to do so.

J. A. M., JR.

REAL PROPERTY LAW

Section 291-e—New—Exceptions, reservations and recitals referring to unrecorded conveyances and contracts for the sale of real property.[1]

The object of section 291-e of the Real Property Law is to eliminate uncertainties and difficulties which may arise from exceptions, reservations or recitals in conveyances of real property referring to unrecorded and unidentified instruments. At present a purchaser may be placed on inquiry notice of these prior conveyances to the extent that a reasonably diligent investigation would have revealed them, despite the fact that the prior instrument is unrecorded. *Dingley v. Bon,* 130 N.Y. 607, 29 N.E. 1023 (1892); see *West Point Iron Co. v. Reymert,* 45 N.Y. 703 (1871). Where there is an indefinite reference to an unrecorded conveyance to guide the purchaser, he must make an onerous investigation before closing so that he may determine the extent of the exceptions, reservations and recitals applicable to the property. If such search is not practical or feasible, the seller may find the marketability of his title decreased or the purchaser may discover his rights later impaired.

Under the legislation any exception, reservation or recital in a conveyance of real property which fails to identify a prior conveyance in any other manner than by indicating that it was made, is void as against a subsequent purchaser in good faith for a valuable consideration without any other notice of the identity of the premises to which the conveyance refers. The exception, reservation or recital is ineffective to create a duty of inquiry on the part of the subsequent purchaser unless the prior conveyance sufficiently identifies the premises referred to and is recorded before the purchaser records his conveyance.

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[1] Recommendation of the New York Law Revision Commission, Leg. Doc. (1960) No. 65 (E). N.Y. Sess. Laws 1960, ch. 688.

Executory land contracts, being recordable in New York under Real Property Law, sections 291 and 294 are covered by section 291-e. Where there is a reference in a conveyance to a previous executory land contract, the latter will be ineffective as against a subsequent purchaser if it is unidentified and unrecorded.

The statute does not impair the effect of an exception, reservation, or recital to limit any warranty in the conveyance made by the grantor. Language which refers to a previous conveyance or contract so as to limit the description of what is conveyed is of importance to the grantor in limiting his warranty. See *Bridges v. Pierson*, 45 N.Y. 601 (1871).

Where such a conveyance containing an exception, reservation or recital was executed before September 1, 1960, section 291-e provides that the prior conveyance to which the exception, reservation or recital refers may be recorded on or before September 1, 1961.

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